CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN THE

WESTERN DISTRICT, AT OPELOUSAS, SEPTEMBER, 1845.

PRESENT:

HON. HENRY ADAMS BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.
HON. RICE GARLAND.

NICHOLAS BROUSSARD and others, Heirs of Amand Broussard, deceased, *v.* JOSEPH GONSOULIN and others.

A confirmation of a land claim by the government of the United States, amounts to no more than a relinquishment of all its rights to the land; it has no effect against third persons.

According to the usages of the Spanish government of Louisiana, a double concession of land could be granted only in the rear of the front tract.

Where parties claiming to be owners of a tract of land, prove an application by each to a Spanish Commandant for a grant of the premises, and a confirmation to each by the United States, but no complete title or grant to either from the Spanish government, and the first applicant is not shown to have ever been in possession, but the last is proved to have possessed and cultivated the premises for a number of years, the claim of the latter must prevail.

Property in real estate is acquired by public, continuous possession, under the title of owner, for thirty years.

APPEAL from the District Court of St. Martin, *Boyce*, J.
Voorhies, for the appellants.

T. H. and *W. B. Lewis*, for the defendants.

GARLAND, J.* The petitioners, as the heirs of Amand Broussard deceased, allege that they are the owners and proprietors of a tract of land at a place called Fausse Pointe, in the parish of St. Martin, having a front of forty *arpents* on the back lines of the tracts fronting on the bayou Tache, by a depth of forty *arpents*, bounded above by the land of François Louvieres, and below by vacant land. Their claim is based on a certificate or recommendation, dated December 31, 1800, signed by De Blanc, the then Commandant of the post of Attakapas, in favor of their ancestor, confirmed by an act of Congress, appproved the 5th of February, 1825, to the full extent claimed; and said claim has been located by a regular survey, made on the 2d April, 1832, by a duly authorized surveyor, and approved by the Surveyor General of the United States. They say that they have been disturbed in their possession of the premises by the defendants, who have taken possession of a part of said land, and set up title to it, although they have none, and have, in various ways, slandered the title of the petitioners to their great damage. They pray to be quieted in their title and possession of the land claimed, that the defendants be evicted, and pay damages, rents and profits.

The answer of the defendants denies the allegations in the petition, and specially avers, that the plaintiffs have no title to the premises occupied by them. They say that they are the *bona fide* owners and proprietors of a tract of land situated at Fausse Pointe, in the parish of St. Martin, having sixteen *arpents* front, on the back line of a tract of land formerly owned by François Gonsoulin their deceased ancestor, with a depth of forty *arpents*, commonly called a double concession, said tract being bounded on one side by land formerly claimed by Amand Broussard, and on the other by land claimed by Joseph Broussard. Said tract of land was granted to François Gonsoulin, the ancestor of the defendants, by the Spanish government, in the year 1802, and they hold by regular conveyances from him, or his

* SIMON, J. having been counsel in this case, did not sit on its trial.

succession. They say that they have been in peaceable and quiet possession of the land for more than thirty years; wherefore they plead the prescription of ten, twenty, and thirty years, having, as is alleged, just titles. The respondents further say, that the names of a portion of the plaintiffs have been used without their consent and approbation, and that they have renounced all claim to the premises described in the petition. They also say, that they hold the land in their possession under titles derived from François Gonsoulin, or his heirs, and they pray that they may be summoned in warranty, and judgment rendered against them in case of eviction.

On the trial below, the plaintiffs offered as evidence, the petition, or *requête*, of Amand Broussard, addressed to Louis Charles De Blanc, Commandant of the post of Attakapas, stating that he is the owner of a tract of land fronting on the bayou Tache, with a depth of forty *arpents*, upon which there is no wood; and as the land in the rear is vacant, he prays that it may be granted to him, according to the same limits. On the 31st December, 1800, the Commandant aforesaid, certifies to the Intendant General, that, according to the certificate of two witnesses, and of the Surveyor of the post, François Gonsoulin, and according to the last regulations of the Intendant, the forty *arpents* front, in the rear of the ordinary depth of the petitioner, are vacant, and that as he, Amand Broussard, was one of the most ancient Acadians of the post, in good circumstances and charged with an increasing family, he recommends that the land be granted to him, and that the Surveyor be directed to make a figurative plan, and continue his operations to obtain a title. This *requête* and certificate were never presented to the Intendant or any other officer of the Spanish Governor, nor further acted on, until after the cession of Louisiana to the United States, when, about the year 1813, it was presented at the land office at Opelousas, for confirmation, and on the 30th December, 1815, favorably reported on, and finally confirmed by an act of Congress, approved February 5th, 1825. The plaintiffs are the heirs of Amand Broussard, who died in the year 1817 or 1818.

The claim of Amand Broussard was first located under an order of the principal deputy surveyor of the south-western district

of Louisiana, by James L. Johnson, a deputy surveyor, on the 2d February, 1827, and approved by Gideon Fitz, Surveyor General of public lands south of Tennessee, on the 24th of August, 1833. This location did not interfere with the claim of the defendants at all, and gave Broussard only $947\frac{56}{100}$ acres, instead of 1354 acres; his confirmation calling for 40 *arpents* front by 40 in depth. Why no more was given, the parol evidence will explain. On the 2d April, 1832, William B. Jackson, also a deputy surveyor of the United States, acting under an order of the Surveyor General of the United States for the State of Louisiana, made another location of Amand Broussard's claim; and, by his survey, 1354 acres were allowed to it, and thus the land claimed by the defendants was included within its limits. This survey was also approved by H. B. Trist, Surveyor General; at what precise date does not appear, but certainly on or before the 15th February, 1834. See plat K and No. 3, in the record. Why two locations of the same claim were made so widely different, is not explained.

On the 10th December, 1802, François Gonsoulin presented his petition, or *requête*, to the Commandant of the post of Attakapas, stating that he had obtained a title to the front lands on the bayou Tache, for fourteen *arpents* front on each side of it, and that he had adjoining his tract, on the lower side, another piece of land; and considering the small quantity of wood thereon, he prays that according to the regulations, the double depth of said land on the east bank only, as well as the whole quantity of the adjoining tract, be granted to him, in order to form altogether a front of sixteen *arpents* on the back line of the front tracts, with a depth of forty *arpents*. On this application, Louis C. De Blanc, the Commandant, certifies, that, it appearing from the regulations of the Governor General, that the inhabitants had a right to the double depth of their concessions, and as the petitioner had used all the formalities, from which it appeared that the land he solicits belongs to the domain, and had a large family (twelve children,) the double depth is granted, as applied for in the memorial, having sixteen *arpents* front by forty in depth, and he is directed to take possession, so as to obtain a title in form. This claim was never presented to the United States officers for confirma-

tion, until about the year 1836; it was favorably reported on, and finally confirmed by an act of Congress, approved July 6th, 1842, but has not yet been finally located.

The parol evidence shows that Amand Broussard, at an early period, but when is not definitely stated, had a cabin and kind of well on the upper part of the land he claims, near to Louviere's line. The cabin was sometimes occupied by his slaves. About the year 1805, or 1806, he proposed to have a survey of his claim made by Evan Bowles, a surveyor. They commenced to run the front line at the lower boundary of Louviere's tract, and after proceeding something like twenty *arpents*, or more, François Gonsoulin disputed the right of Broussard to proceed further down. A post was planted at the place where Bowles stopped, in consequence of Gonsoulin's opposition, and no side or back lines were then run. Broussard's cabin and well were above this post, and there is no evidence that he ever occupied any land below it. He died in 1817, or 1818, and there is no proof of the land being occupied since. When James L. Johnson made his survey, he measured about eighteen *arpents* front for Amand Broussard, and nine *arpents* front for Edouard Broussard, his son, and he went no further. Who was present when Jackson made his survey, except himself and his chain carriers, is not shown.

The proof of occupancy and cultivation on the part of Gonsoulin, the ancestor, and his children, on the land claimed by the defendants, is ample. Lewis Moore says, he was on the land in June, or July, 1804, with some other persons. The sons of François Gonsoulin were then there; had a house, a field, a pen, a well, and other things that indicated a permanent establishment. The house was in or near the woods, perhaps seventy *arpents* from the bayou Tache. The high water subsequently drove them into the prairie, some twenty *arpents* nearer to the bayou, where defendants now live. Neuville Declouet says, that in the year 1805, he was at the place where the young Gonsoulins were settled, and that he lived near to them. The place when he first saw it, appeared to have been established some time before. They were on the back concession, and have never quited it, although they removed from near the woods into the prairie. Desiré Le Blanc says that, in 1809, he purchased of François Gonsoulin, twelve

arpents front by forty deep, of the tract fronting on the bayou Tache. There was then a cabin on the second concession. Other witnesses speak of the settlement at other periods, as far back as 1810, 1811, 1812, and other years. Some of the witnesses say, that they never saw any improvements made by the Gonsoulins, until about the years 1810, 1811, or 1812; but the weight of the testimony is in favor of the settlement having been made much earlier. The testimony of Lewis Moore and Declouet is positive as to their being on the land in 1804 and 1805. The testimony of Desiré Le Blanc goes to confirm their statements. They all state circumstances calculated to impress the fact upon their recollection. Moore says that he was at the house the first year he came to the country. Declouet fixes his date from the fact of his going to live in the big woods in 1805, near to the defendants; and Le Blanc's recollection is fixed by his purchase of a part of the Gonsoulin tract of land. Nearly all the other witnesses differ as to the dates when they saw the improvements, which shows how uncertain their recollections are as to so ancient an establishment. Lewis Moore mentions a circumstance, which, in some measure, accounts for the improvement not being generally seen. The house was on the edge of the woods, about seventy *arpents* from the bayou Tache, and the grass then grew very rank in that quarter, as high as the head of a man on horseback, and it was difficult to see the house from the road. Somewhere about the year 1810, the Gonsoulins were driven into the prairie by the high water, and then their establishment was plainly seen and well known. It is possible that some of the witnesses supposed that that was their first improvement. The principal residence of François Gonsoulin was on the front tract, and the place in the rear was occupied sometimes by one or more of his sons, and then by some others.

It is admitted that the defendants are vested with all the title François Gonsoulin had to the land, and his title to the front tract on the bayou is not disputed.

By a reference to the original *requête* of Amand Broussard, it does not appear with any certainty, what quantity of land he wished the Spanish officers to grant him, nor does the certificate of the Commandant fix it. When Gonsoulin applied for his

double depth, about two years after Broussard's application, the Commandant certified that the land was vacant. When Bowles attempted to make a survey, about 1806, of Broussard's claim, Gonsoulin then objected to his going beyond a certain point, and stopped him. A post was then planted; and there is no evidence that Broussard ever in his lifetime, claimed the land below it. He certainly never occupied it, and Gonsoulin did. In 1827, when Johnson made a location of the claim, it was not surveyed so as to interfere with the defendants, and no right seems to have been preferred by the plaintiffs, until after Jackson's survey, in 1832. It is true, that the United States confirmed the claim for forty *arpents* front, by the same depth; but that amounts to no more than a relinquishment on the part of that government of all its right to the land in favor of Broussard, but deprived the defendants of no right they had, for they have a relinquishment in their favor of the same kind.

According to the customs and usages of the Spanish government, a double concession could only be granted in the rear of the front tract, and Broussard asked for no more in his *requête.* He says that the land in the rear is vacant, and prays that it be granted to him "*suivent les mêmes limites.*" This certainly does not entitle him to take the land in the rear of Gonsoulin's front tract, and we do not believe it was ever intended by the Spanish authorities that he should do so.

The application of Broussard for the land he solicited of the Spanish authorities, and the certificate of the Commandant that it was vacant, &c., is older than the application of Gonsoulin; but neither was ever presented to, or approved by, the Intendant of the province, and no title passed to either, from the act of the Commandant. That could only be perfected subsequently by the possession of the parties, and the action of Congress. By it, both titles have been confirmed, and possession and cultivation by the defendants, and their ancestor, are proved most fully, and none is shown on the part of the plaintiffs or their ancestor; therefore the doctrine established by this court in the case of *Gonsoulin's heirs* v. *Brashear* (5 Mart. N. S. 33) will apply. It was held in that case, that a younger title, with actual possession and cultiva-

tion for a number of years, would prevail over an older title where no possession was proved.

It also appears to us, that the plea of prescription must prevail. This suit was commenced on the 13th of April, 1835; the possession of Gonsoulin is shown to have commenced in 1804, and it has been open and continuous ever since. He had the permission of the Commandant to take possession of the land to the extent of sixteen *arpents* front by forty in depth; he always claimed to possess to that extent; and, we think, his vendees and heirs ought not now to be disturbed.

Judgment affirmed.

PIERRE LABICHE for the use of Fouillade and another *v.* THOMAS H. LEWIS and others.

Where property has been seized under a *fi. fa.*, before the return day, the sheriff may retain the writ, and sell the property after the time fixed for its return.

To prevent the sacrifice of debts seized under a *fi. fa.*, the parties to the execution agreed that the sheriff should suspend the sale and retain the writ after the return day, authorizing an agent to proceed to collect the debts. Other creditors of defendants in execution, subsequently to this agreement, levied a *fi. fa.* on the same debts in the hands of the sheriff, and it was agreed between them and the plaintiff in the original execution, that the debts should be sold under the first writ, "the proceeds of the sale to be held by the sheriff, subject to the orders of the proper court." In an action to determine which of the seizing creditors was entitled to the proceeds: *Held*, that no bad faith being imputed to the parties, they had a right to suspend the sale; that the debts never ceased to be under the control of the sheriff; that having permitted the sale to be made under the first execution, the creditors in the second execution cannot attack its legality; and that the creditor who first seized is entitled to a preference on the proceeds of the sale. C. P. 722.

Notice to the debtors is not required where debts or credits have been seized under a *fi. fa.*; such notice is only necessary where a debt or credit has been transferred or assigned. The seizure of a debt does not transfer the property in it to the seizing creditor; it gives him only a right to be paid out of its proceeds when sold, until which time the defendant is not divested of his title.

APPEAL from the District Court of St. Landry, *King*, J. *Overton* and *Dupré*, for the plaintiff.

Lewis, appellant, *pro se*, *Martin* and *Swayze* for the other appellants.

Labiche, for the use &c., v. Lewis and others.

SIMON, J.* The object of this controversy is to ascertain who, of several seizing creditors of the houses of Lastrapes & Benguerel and Lastrapes Frères, by virtue of whose executions, divers notes, accounts and other credits were seized and sold by the sheriff in satisfaction of judgments regularly rendered, is entitled to receive a certain amount proceeding from the sale of the property seized? The judge, *a quo*, was of opinion that the plaintiff Labiche, as first seizing creditor, was entitled to the funds in dispute; and from his judgment, the defendants have appealed.

It appears that, on the 6th of February, 1843, a writ of *fieri facias* was issued for a large amount, at the suit of the appellee, against Jacques Lastrapes et al., and was levied upon the property in controversy, on the 8th of the same month. The sale was advertised by the sheriff to take place on the 4th of March ensuing, but on that day the sale was postponed to the 15th. On the day last fixed, a part of the property seized, consisting of dry goods and other articles, was sold to a certain amount, it being two-thirds of the cash estimation made on the 4th of March; when on the 17th, pending the sales, and previous to proceeding to the sale of the debts, rights, and credits levied on, the parties interested in the execution entered into a certain written agreement, in which it is specified: that "whereas it is *for the interest and advantage of all persons interested* in the premises that the rights and credits (above enumerated) *should not be sacrificed* at sheriff's sale, the parties interested in the suit, plaintiff and defendants, mutually agree to *suspend the further execution of the writ of fi. fa. and that the Sheriff shall hold the same in his hands, the seizure of the said rights and credits, books, notes, accounts and judgments to remain in full force and virtue, and the said writ to continue in force, without removal for an indefinite period, and until further directions of all the parties hereto*, or until the said rights and credits can be collected and applied as hereinafter di-

* GARLAND, J. did not sit on the trial of this case, in consequence of relationship to some of the parties.

rected." The agreement further stipulates that "the whole of the books, accounts, rights and credits, &c., shall be placed in the hands of Robert Benguerel, who shall proceed to collect the same as fast as possible, and *to pay over the proceeds, as collected, to the Sheriff of St. Landry, or the plaintiff, and said proceeds shall be credited on said writ as paid over*;" and all the parties bind themselves to hold the Sheriff harmless, and to guaranty him against any loss or damages that might result from a compliance with the agreement, &c.

On the 22d of March, another seizure was made of lands and slaves, which were advertised to be sold on the 6th May, but the sale was postponed by agreement to the 9th, when it was again postponed until further orders.

On the 17th of July following, in consequence of instructions given by plaintiff and defendants in execution, all the rights and credits, &c., of said defendants which had been seized on the 8th of February, and the sale of which had been suspended, were advertised to be sold on the 5th of August, 1843, on which day the appraisement thereof was made. This advertisement recites that the property is to be sold by virtue of the seizure made on the 8th of February, 1843, and the property was so sold after several postponements, as will be hereafter noticed.

It appears, however, by the sheriff's return on the plaintiff's writ, and this is the origin of the controversy, that previous to the 5th of August, divers writs of *fi. fa.* were issued at the suits of sundry creditors of the defendants in execution, which were placed in the sheriff's hands, and which were by him levied on the same rights, credits, notes, accounts, judgments, &c., which were in his possession under the plaintiff's writ, and that this new seizure was notified to the debtors, defendants in the said plaintiff's execution, on the 6th and 12th days of July, and 4th of August, 1843. Those writs are not in the record, and the facts relative to their having been issued and levied on the property in dispute, only appear by the sheriff's return on the plaintiff's writ, which seems to have been the only one acted upon in the sale and disposition of the property seized.

On the 5th of August, the sale was postponed by consent until the 8th, when the rights and credits were offered for sale for cash.

It produced a certain amount, and the rest was advertised to be sold on the 2d of September at twelve months' credit. The Sheriff states in his return that, "*previous to proceeding to the sale last mentioned, it was understood and so announced that the rights and credits which had been seized on the 6th of July and 4th of August by virtue of several executions, would be offered for sale and would be sold under this writ,* (meaning the plaintiff's,) *but the proceeds arising therefrom would be held in my hands subject to the orders of the proper court;*" and the balance of the property seized on the 8th of February was accordingly sold on the 2d of September at twelve months' credit, and produced a certain amount which, added to the amount of the cash sale made on the 8th of August, forms the subject of this controversy.

On the 4th of September, 1843, by instructions of the parties, the property seized on the 22d of March was advertised to be sold on the 5th of October. The sale was postponed by consent until the 2d of November, on which day the property was appraised; a part of it was sold for cash, and the residue advertised to be sold on the 7th of December, when it was adjudicated at twelve months' credit; and on the day last mentioned, the writ of *fi. fa.* was returned not satisfied.

It appears further from the sheriff's return, that Robert Benguerel accounted to the plaintiff for a sum of $2038 95, under the written agreement; that Theodore Lastrapes also accounted to said plaintiff for the sum of $1152 71; and that those sums were credited on the execution, and included in the amount accounted for by the Sheriff, as having been realized under the writ. The sum in dispute, proceeding from the sales made on the 8th of August and 2d of September, amounts to $3093 19.

Two questions have been raised by the appellants' counsel in support of the pretensions of his clients to the amount in controversy. He has contended:

1st. That the seizures made under the plaintiffs' *fi. fa.* are illegal, informal, and void as to the appellants; that the plaintiff had no legal right to suspend the execution of his writ and to keep it in force beyond the time within which it should have been returned, and that said writ thereby lost all its force and ef-

fect against those, who had a legal right, after the expiration of the plaintiff's writ, to have the property seized and sold for their benefit.

2d. That the seizure and sales made under the plaintiff's writ are illegal and void, as the debtors of the debts and credits seized were not notified of the seizure, and might have validly paid the sums due into the hands of the defendants in execution; and that, therefore, the appellants' seizures, and privilege resulting therefrom, ought to have the preference on the proceeds.

I. To the first question, it might perhaps, be answered at once, that the appellants themselves have participated in the irregularities and informalities by them complained of; since, although they were aware of the manner in which the plaintiff's proceedings had been carried on, and of the suspension of the execution, they consented to cease acting under their own writs, and permitted the Sheriff to proceed to the sale of the property under the plaintiff's execution. These writs were levied, says the Sheriff in his return, upon property already seized under the plaintiff's writ, and nothing further was done under those writs, which, nothing shows, were ever returned. Why did not the appellants, if they really conceived that they had acquired better rights to the property seized than the plaintiff, require the Sheriff to proceed under their own executions, or at least to proceed simultaneously with that of the plaintiff? Instead of arresting the progress of proceedings which they now say are illegal, informal and void, they consented to their being carried into effect, only reserving the question of preference on the proceeds of the sale, and fully acquiesced in the Sheriff's acting under the exclusive authority of the plaintiff's writ. Was not this recognizing that the levy made under said writ was legal, that the Sheriff had a right to act under it, and that the sale would be a legal one? If so, that alone would perhaps be sufficient to defeat their pretensions; as, if the levy and sale were legally made, the plaintiff ought necessarily to be entitled to the benefit of all the consequences of his legal proceedings under his execution.

We have repeatedly held, that if a levy be made before the returning of the writ, the Sheriff may proceed to sell after the expiration of that day; (3 Mart. N. S. 493; 8 Ib. N. S. 391; 2 La.

277 ; 1 Rob. 540; 2 Ib. 341 ; and in a number of other cases ;) and the reason is, that the property levied on within the legal delay, being in the hands of the Sheriff under the authority of the writ, he ought not to be precluded from disposing of it within the object of the law and of the authority conferred upon him by the execution, by the mere expiration of a delay which the law indicates for the benefit of the seizing creditor only, by whom it may be waived. Otherwise, such expiration would be a great inconvenience, nay, even an obstacle to carrying the writ into execution ; as, oftentimes, the Sheriff is prevented by circumstances from making a levy until he has made diligent searches for property on which it can be made; and as it often happens that, notwithstanding his exertions, he cannot find property to seize until the delay for returning the writ has nearly run out. The safest course, under such circumstances, is to keep the writ after the return day has expired, provided a levy has been made before, and to return it only after the sale has been completed. Every facility should be allowed to the creditor to realize the amount of his execution, provided it be with due regard to the rights of other persons, and in accordance with the protection which the law affords to the unfortunate debtor whose property is seized, and on the eve of being sacrificed. This doctrine was to a certain extent recognized by this court in the case of *Fink* v. *Martin*, (decided in July, 1844,) in which we held that the defendant in execution cannot be deprived of the use of his property, when it cannot be sold, on account of previous incumbrances, and be compelled to see its value exhausted in unnecessary costs and expenses. As it has been very properly remarked by the judge, *a quo*, in his written opinion, no limit appears to have been fixed in any of our decisions to the indulgence which the creditor may extend in that respect to the debtor, when it is accorded in good faith ; and if it is in bad faith and for the purpose of protecting the property of his debtor against the pursuit of other creditors, the latter would not be without remedy.

In this case, however, the parties to the agreement under which the sale was suspended, had no such object in view ; their acts are free from suspicion ; the object was to prevent a sacrifice of the property seized, and render it as productive as possible ;

and if they all consented to the Sheriff's putting the debts and credits under seizure, into the hands of Robert Benguerel, for the purpose of being collected as fast as possible, they also stipulated that the Sheriff should hold the writ in his hands, that the seizure should remain in full force and effect, that the writ should continue in force, and that Benguerel should pay over the proceeds as collected to the Sheriff, or the plaintiff, to be credited on the execution. This was done under the agreement for the advantage of the debtors, and without injury to any body else; and, under such circumstances, considering also that the appellants' rights did not exist at the time of the agreement, and only commenced to vest about the time that the sale of the property was advertised to be made on the 5th of August, we cannot see any valid reason why the original levy should be invalidated, particularly when it is shown that the Sheriff never lost his control over the property seized; that on the contrary the possession of Benguerel was that of the Sheriff, to whom he was bound to pay the money, and that the appellants, after making a levy on the same articles, gave their unqualified consent to the sale thereof being made by virtue of the plaintiff's levy and under his execution. They reserved, it is true, their right of having the distribution of the proceeds regulated by the proper court; but this was acknowledging, virtually, the legality of the seizure and the sale; as, if any balance had remained of its proceeds after satisfying the plaintiff's claim, the appellants would clearly have been entitled to receive it under their subsequent seizure.

We conclude, therefore, that the levy made for the plaintiff was perfectly legal and valid; that no fraud, bad faith, or collusion being imputed to the parties to the agreement, they had a right to suspend the sale, and to cause it to be made after the return day; that in the mean time, the property seized never ceased to be under the control of the Sheriff to whom the funds were to be paid and credited on the writ; that the appellants, having consented to give effect to the levy by permitting the sale to be made under the plaintiff's execution, cannot be allowed to attack its legality; and that the judge, *a quo*, did not err in maintaining the plaintiff's right to its proceeds in preference to the defendants,

by virtue of whose executions and levies the property was not sold. Code Prac. art. 722.

II. We cannot see the object of this point: The appellants' levy never had its effect by the sale of the property levied on under their writs; and thus, there are no conflicting sales from which the question could be raised, which is the best? And it seems also, that the said appellants cannot avail themselves of the want of notice, if it be an irregularity, because they all appear to have had full knowledge of the proceedings which were carried on with their consent. But be this as it may, there was clearly no necessity for the Sheriff's giving notice to the numerous debtors of the debts and credits seized, that the sale thereof was made; such notice is necessary only after transfer, or assignment of the debt. Civ. Code, arts. 2612, 2613, 2614. In the case of a seizure of a debt, such seizure does not transfer it to, or vest the property in it in the seizing creditor; but merely gives to the latter the right to be paid from the proceeds of the sale, or transfer thereof to another person. The Sheriff must be considered as transferee of the debt by him seized; he acts merely as the agent of the parties; but the defendant, until the sale, is not divested of his title to the object seized; he still continues to own it, so much so that he may take it out of the Sheriff's hands, on paying the amount of the execution, in principal, interest and costs. Our Code of Practice has not provided for the formality of giving notice to the debtor of a debt or credit seized under execution. No such requisite is found in it. It may be prudent to give it, to prevent payments, but the only notice to be given is that which the defendant is to have; and we do not feel disposed to legislate upon this subject by requiring a formality which our laws have never contemplated in cases of seizure under execution. Code Prac. arts. 642, 643, 654, 655, 666, 677.

Judgment affirmed.

The Bank of Louisiana *v.* Felix Déjean.

Action against defendant personally for the amount of a promissory note, signed by him as executor, and endorsed by two other persons. It was proved that the note was given in part renewal of one made by defendant's testator, endorsed by the same persons, and which had been discounted for the deceased by plaintiffs; that the original note of the deceased was for a larger amount, which had been reduced in his lifetime by curtailments; and that, after his death, the debt was diminished by further curtailments, and the execution of new notes, signed by the defendant, as executor of the estate of deceased, or simply as executor, until reduced to the amount for which the note sued on was executed. *Held*, that the defendant is not liable personally; that the facts show that it was not originally contemplated by any of the parties that he should be so responsible; that the execution of the note sued on created no liability on the part of the estate of the deceased, nor even changed the nature of the original obligation, but was a mere acknowledgment of a debt which the executor was competent to make.

An administrator or executor cannot change the nature of the obligations of the succession, nor increase its responsibility with regard to outstanding debts, nor subject it to any new liabilities; if he attempt to do so, he will be personally bound. But he may acknowledge claims due by it, (C. P. 985,) pay or reduce its debts in due course of administration, or perform any other acts necessary for its liquidation.

Appeal from the District Court of St. Landry, *Boyce*, J.

Simon, J. The defendant, Felix Déjean, is appellant from a judgment which makes him liable *personally* for the amount of a note of hand which he signed *as executor* of the estate of the late A. H. Andrus, deceased.*

His defence is that the deceased, previous to his death, executed a note for the sum of $1360, which was discounted by

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* The note sued on in this case is in the following words:

"Opelousas, November 26th, 1842.

$366.

Twelve months after date I promise to pay to the order of Joseph E. Andrus, at the office of discount and deposit of the Bank of Louisiana, at Opelousas, elected domicil, the sum of three hundred and sixty-six dollars, value received.

F. Dejean, *Executor*.

Credit the drawer, T. H. L.

(*Endorsed*)

Joseph E. Andrus.

Thomas H. Lewis.

the plaintiffs, and matured after the death of said Andrus; which note, endorsed by Joseph E. Andrus and T. H. Lewis, was renewed at maturity, and reduced by curtailment to the sum of $1088, for which the appellant furnished a note, as testamentary executor of the deceased; which last note was curtailed and renewed from time to time by said appellant, in his capacity of executor, until the same was reduced to the amount for which the note sued on was given. He further states, that the plaintiffs were aware of the capacity in which he bound himself; that he acted in accordance with the wishes of the endorsers, with the consent and approbation of the plaintiffs, and with the understanding of all the parties interested that he should not incur any responsibility resulting therefrom, as he had no motive to become surety for, or to assume the payment of said note.

The evidence establishes the facts pleaded in the appellant's answer; it shows that said appellant signed the note sued on *as executor;* that the deceased made a note in his lifetime, *with the same endorsers;* that the said appellant was duly appointed by testament the executor of the estate of the deceased; that several directors of the Bank of Louisiana who were examined as witnesses, knew that the defendant was Andrus' executor: that some of them consulted upon the subject of the effect of his signature as executor; and that, though they seemed to have some doubt about the matter of law, whether the defendant did not, by signing the note as executor, bind himself personally, they considered the endorsers good and discounted the note. It is further admitted, in the statement of facts, that the original note of the deceased to the Bank of Louisiana was for a much larger sum, which he diminished gradually in his lifetime by payments, and renewals for the remainder; and that, after the death of the drawer, the debt was renewed by notes sometimes signed by the defendant as executor of the estate of A. H. Andrus, and sometimes as executor simply, until finally the debt was reduced to the amount of the note sued on.

It is perfectly clear, that the defendant never acted in this transaction with any idea of becoming bound personally to pay the debt of the deceased, which the latter had contracted towards the plaintiffs in his lifetime. That debt, which the defendant,

as executor, subsequently reduced to the amount sued for, by partial payments by him made also as executor, had been contracted in the same manner, and with the same endorsers, towards the same persons, as the one in controversy; nothing was changed in the nature of the obligation. Such as it was at the time of the death of the drawer of the original note, such it is now, except that it is for a smaller sum, and that the name of the testamentary executor of the deceased has been substituted to the signature of the testator. This appears to have been well understood by the plaintiffs, who permitted the curtailments and renewals of the original debt, and who consented to take the new notes, given successively in renewals, with the signature of the defendant *as executor* of the original drawer. This was not creating a liability on the testator's estate, it was not even changing the nature of the original obligation of the deceased; the debt existed at the time of his death, and the acts of the appellant cannot be viewed in any other light than as an acknowledgment of said debt which he was perfectly competent to acknowledge. He paid divers sums at different periods *as executor*. Those sums went to the credit of the succesion which he represented; they reduced the debt; and the amount of the note sued on may be fairly considered as the balance due on the original note standing against the testator at the period of his death. If the new note had been taken with the defendant's signature in his own name and not as executor, the case would be different, for then there would have been an apparent novation, and he would not perhaps be allowed to say that he intended to give it as administrator or executor; but, when the object of the contract, the cause from which it originated, and the capacity of the person by whom it is executed, are well known to the party in whose favor it is made, and the facts are brought home to him, we should hesitate very much before throwing upon the obligor a responsibility different from that which was originally intended by all the parties. In the case of *Gillett & Co.*, v. *Heirs of Rachal*, (9 Robinson, 276,) we held in substance, that a note given by an executor or administrator, in his said capacity, in renewal of one executed by the deceased in his lifetime, without changing the nature of the obligation, should be considered as an acknowledg-

ment of the debt, and that such executor or administrator did not thereby incur any personal responsibility. So should it be here, under the circumstances of the case.

We have repeatedly held that, as a general principle, an administrator cannot create any liability on the estate by his contracts. Under this principle, as early as the 5 Mart., N. S., 529, in the case of *Flower et al.* v. *Swift*, this court said, that an executor could not endorse a note payable to the estate, and that in doing so, the debt or obligation was contracted in his own right. So in 8 Mart., N. S., 451, in the case of *Flower et al.* v. *Swift*, the same principle was again recognised, and it was decided that the executor could not bind the estate to pay damages, or even to refund the amount of the note. So in 2 La. 185, in the case of *Russell et al.* v. *Cash et al.* an executor was held personally liable to pay the amount of a draft which he had given as executor, as it was creating a liability on the estate which he had no authority to do; and, in the case of *Hestres* v. *Petrovic et al.*, 1 Rob. 119, we decided, that if an administrator discount a note which he has received in payment on the sale of any property of the estate, his endorsee has a claim against him personally, and cannot be compelled to wait for payment in the ordinary course of the administration. The distinction is very obvious. On the one hand, an administrator or executor cannot, in any transaction in which he pretends to act as such, create any liability on the estate, or change the nature of its obligations, or increase its responsibility with regard to its outstanding debts; and if he does so, he will be personally bound. But on the other hand, he may acknowledge the claims due by the succession, (Code Pract. art. 985,) pay or reduce its debts in due course of administration, and perform all the other acts necessary for its liquidation. Here, no new debt or liability has been created; the note sued on is merely the evidence of the balance due to the plaintiffs by Andrus' estate on the original note, which was acknowledged and renewed by the defendant in his capacity of executor; the nature of the debt is not changed; the parties are the same, and their liability is also the same; and we think the defendent has been incorrectly made personally responsible for its payment.

With this view of the question, the only remedy of the plaintiffs as to the liability of the drawer of the note sued on, is against the succession of Abraham H. Andrus, to be exercised in the Court of Probates of the parish where it was open.

It is therefore ordered and decreed that the judgment of the District Court be reversed, and that ours be for the defendant and appellant, with costs in both courts.

T. H. Lewis, for the plaintiffs.

Voorhies for the appellant.

JOHN SMITH *v.* NATHAN BERWICK and another.

Where slaves have been seized under a *fi. fa.*, and the sheriff, with the consent of the plaintiff in execution, leaves them with the debtor until the day of sale, they will be considered as in the legal custody of the sheriff; and one proved to have aided the debtor in removing them beyond the limits of the state, with a view to defraud his creditors, will be responsible to the latter to the extent of the injury they may sustain in consequence, and the full value of the slaves will be the measure of damages, if the debt amounts to so much. C. C. 2294, 2295, 2304.

Testimony that will satisfy a jury of the guilt of the defendant is sufficient to maintain the action; and every fact proved, calculated to produce this conviction, should be considered, in coming to a conclusion as to his knowledge of the fraud.

Every man is responsible for injury done to another, though occasioned by negligence or imprudence. C. C. 2295.

An action may be maintained by a creditor against a third person for the injury done to him by the latter, in aiding his debtor to remove his property beyond the limits of the state, though a suit be pending, by the creditors against the debtor, in the country to which the property was removed, for the purpose of subjecting it to the payment of the debt. But the defendant, on proving that any thing has been made in the action against the debtor, will be entitled to have the amount deducted from the sum for which he would otherwise be liable.

APPEAL from the District Court of St. Mary, *Boyce*, J.

GARLAND, J. The plaintiff alleges that, in the month of April, 1841, he obtained a judgment in the District Court of St. Mary against Benjamin M. Mayes, one of the present defendants, for $7869, 74, with interest and costs. That on the 28th of April, an execution was issued on said judgment, and, by the sheriff

of the parish, levied on a number of slaves, which were duly advertised for sale in the month of June, 1841. He further says, that the said Mayes, with the intention to cheat and defraud him out of his debt and legal rights, a few days before the day of sale, caused said slaves to be secretly and clandestinely removed from, or taken out of, the jurisdiction of the courts of this state, and conveyed to the republic of Texas. That, in the removal of said slaves, the defendant, Mayes, was aided and assisted by his co-defendant Berwick, who knew that the said slaves were mortgaged to the plaintiff; that he had a judgment against Mayes, and that the slaves were advertised for sale under the execution aforesaid; in consequence of which illegal acts of said Mayes and Berwick, in removing said slaves out of the state, or causing them to be removed, he, the petitioner, has sustained damages to a large amount, for which he prays for judgment.

The curator, *ad hoc*, of Mayes, who resides in Texas, answered by a general denial. Berwick denies generally the allegations of the plaintiff. He says that he never had any thing to do with the slaves of Mayes; that plaintiff had no mortgage on them when they were taken away, and that this suit is vexatious. He further says, that the plaintiff has instituted a suit in Texas against Mayes for his claim, and is endeavoring to have the slaves there subjected to it; also, that said plaintiff has instituted a suit in the parish of St. Mary against P. Delahoussaye, Sheriff of said parish, in which he claims damages to an amount sufficient to cover his debt; wherefore he prays to be discharged.

The evidence is, that Mayes owed the plaintiff upwards of $13,000, payable in 1841 and 1842; that to secure the payment of the sum owing, the former, who resided in Mississippi at the time the debt was contracted, executed a deed of trust on a number of slaves and other property, to secure the payment of the debt. He subsequently removed to the parish of St. Mary, and sometime after the first instalments of the debt became due, a suit was instituted and judgment confessed for the sum of $7869, 74, with interest and costs; but neither the deed of trust or judgment were recorded in St. Mary, previous to the removal of the slaves by Mayes. Execution was issued, and a levy made by the Sheriff on upwards of twenty slaves, by the consent of

Mayes, and one Bethel, the reputed agent of plaintiff. It was agreed that the slaves and other property should remain in the possession of Mayes until the day of sale, the Sheriff dispensing with the giving of a bond and security to produce the property on the day of sale. The sale of the property was duly advertised in the newspaper published in the parish, and at different public places. Berwick was a subscriber to the paper, which was regularly sent to him by mail every week, a distance of about twenty or twenty-five miles. The advertisement was a long one, and conspicuous in the paper; but there is no positive evidence that he received the papers containing it. Some twelve or fifteen days before the slaves and property were to be sold, the defendant Berwick went to the house of one Daniel Keiffer, on the bayou Chaver, and told him that there was a man named Mayes who wanted to carry some slaves to Texas, and that he, Keiffer, could get well paid for carrying them there. Berwick told the witness, Keiffer, that he could get a negro man for it. It was arranged between Berwick and Keiffer that the latter should come up in the evening,—the witness thinks it was a Sunday evening. Keiffer and a man named Fry, came with two boats and took the negroes on board in the night, between midnight and morning. The negroes were carried into the Sabine River, and landed on the Texas side. Mayes went with them. The boats left the bay sometime before day, in the morning. Keiffer says, that he did not see Berwick the night they left with the negroes; but Fry says, that when they came on board he heard some person speak, whom he took to be Nathan Berwick. It was very dark. He had heard Berwick speak before that night. Fry says, that the bargain made with Keiffer was kept a secret from him, and made in such a manner as to be "as concealed as possible." Berwick and Mayes resided very near each other—about half a mile apart, and were friends. There is no evidence that either Keiffer or Fry ever had any communication with Mayes previous to going off with the slaves, except through Berwick. Upwards of twenty slaves were taken away in the boats.

These are the material facts of the case, and upon them, under

a charge from the judge presiding, the jury found a verdict for the defendant Berwick,* and the plaintiff has appealed.

Our attention has been directed to a bill of exceptions, taken by the counsel for the plaintiff, to the refusal of the judge to charge the jury as requested. The counsel requested the judge to instruct the jury:

1st. "That the property of Mayes, although by the consent of plaintiff's agent it remained in the actual possession of Mayes, was in the custody of the Sheriff; and that if the jury were satisfied that the defendant Berwick had aided and assisted the said Mayes in removing the same out of the state, and the plaintiff had, in consequence thereof, suffered any damage, he was bound, under the article 2294 of the Civil Code, to repair it.

2d. "That a deed of trust executed in Mississippi, when duly recorded in this state, had the same force and effect as a conventional mortgage under our laws, and that the deed of trust, executed by Mayes, in favor of plaintiff, being recorded in the Parish Judge's office of St. Mary, operated as such.

3d. "That although it is conceded that a debtor has the right of removing his property out of the state, when not mortgaged, yet, if done in a clandestine manner, the person aiding and assisting in the act, with a knowledge of the circumstances, makes himself responsible for the damage resulting therefrom."

The judge refused to charge the jury as requested, but charged them in substance as follows:

1st. "The jury are informed that it is only those acts of man morally wrong in themselves, or prohibited by some law, which, when committed, produces injury to another, which enables the party injured to recover damages from the party committing, or aiding to commit the act.

2d. "That in those kinds of actions, the proof ought to be clear and satisfactory in favor of the plaintiff, to enable him to recover from a person who commits the act, and is no gainer thereby.

3d. "That as to the deed of trust passed in Mississippi be-

* The case was not tried as to Mayes.

tween the parties, and contemplated to be carried into effect there, although it might, as between them, produce the same effects as a mortgage here, yet it does not come within the spirit of our penal law, forbidding such property being taken out of the limits of Louisiana; and that, in the opinion of the court, the party might carry it back again to Mississippi, or any other adjoining country without incurring any penalty for doing so under the law; and those who might aid him would not, in this view, be amenable in damages. And that the judgment obtained by the plaintiff against Mayes, not being recorded when the slaves were taken out of the state, there was no judicial mortgage on them under our law.

4th. "That by advertising the slaves in the manner related by the evidence, the court thought there was not such a change of possession of them into the custody of the law, as if they had been seized on in the ordinary way; and as Bethel, the agent of plaintiff, had agreed that Mayes might keep possession of them to the day of sale, if Mayes abused this possession, and ran them off, he would not be guilty of larceny, as in other cases where the defendant should clandestinely carry off his property, when the Sheriff had levied on it.

"But though this was the opinion of the court, the jury was directed, if they were satisfied that Berwick knew they were advertised, and, knowing this, did aid Mayes to run off the slaves to the injury of Smith, the plaintiff, when well satisfied of this knowledge and acts of Berwick, they ought to find damages against him to the extent of the injury the plaintiff has sustained by this act. But if not satisfied of this, they ought to find for the defendant. And though he may have carried the message to the owner of the boat from Mayes, it was for the jury to judge whether it was done heedlessly, or with the intention above mentioned, in connection with other circumstances."

We are satisfied that the charge of the judge was incorrect and illegal in several respects, and in some degree contradictory in itself. Nor are we satisfied that the judge should have charged the jury precisely in the terms required by the counsel for the plaintiff. Instead of pointing out in detail each particular error in the charge requested, and that given, it will be more

plain and simple to state what the law is, and what the judge should have told the jury. The law is, that every act of man that causes damage to another, obliges him, by whose fault it happened, to repair it. Every person is responsible for the damages he occasions, not merely by his act, but by his negligence, his imprudence, or want of skill. Civ. Code, arts. 2294, 2295. And he who causes another to do an unlawful act, or assists or encourages in the commission of it, is answerable, jointly with that person, for the damage caused by such act. art. 2304. The property of a debtor is the common pledge of his creditors, and whosoever unlawfully deprives them of the benefit of that pledge, or aids or assists in doing so, is liable to the creditor, who proves that he has beeen injured by it, and must compensate him in damages. In the present case we think that the slaves, although left in the possession of Mayes, were in the legal custody of the Sheriff, after the seizure; and although the consent of the plaintiff's agent, that they should remain with Mayes, may probably protect the Sheriff from any claim for damages on the part of the plaintiff, yet the consent amounted to nothing more than that Mayes should be the keeper of the slaves until the day of sale; and neither he, nor any other person, had a right to carry them off to the injury of the plaintiff.

We are not prepared to say, that the deed of trust executed in Mississippi, when recorded in this state, has technically the force and effect of a conventional mortgage according to our laws. But, as between the parties, it operates as a lien on the property mentioned in it, and, when recorded, it gave a preference in favor of the plaintiff over creditors, having no such preference or security; and neither the defendant Mayes, nor Berwick, had a right to deprive him of that preference or lien, by running off the property on which it operated.

It is true, a debtor has a right to remove out of the state, with his property, when not mortgaged, if he does not do so in a clandestine manner, and with the intention of defrauding his creditors; but if it appears that the object in removing the property, is to cheat and defraud a creditor or creditors, then the debtor is responsible in damages, as well as all who aid and assist him, whether the property be mortgaged or not. If the property be

mortgaged, then the parties may be punished criminally; but if not, they are civilly responsible for all the injury caused by the act.

The Judge should have instructed the jury, that it is morally wrong and prohibited by law, for a debtor to abscond with his property, to the injury of his creditors; that it is not necessary that the removal of the property should be in such a manner, and under such circumstances, as would subject the parties concerned to punishment in a criminal prosecution; but, that the true question is, has the creditor been injured by the act; if so, he is entitled to damages.

The Judge should have instructed the jury, that in actions of this kind, as well as in other actions for damages, the evidence ought to be satisfactory in favor of the plaintiff, to enable him to recover from a person who commits the act, and is no gainer thereby. But this peculiar species of action, does not form an exception to the general rule; and only such testimony is required as will produce conviction on the minds of the jury that the defendant is culpable.

It is true, that if the judgment in favor of the plaintiff was not recorded in the manner required by law, it did not operate as a judicial mortgage on the property of Mayes; but that in our opinion makes no difference, as neither he, nor any one else, had a right to run away with his property, and thus defraud his creditors.

This court is satisfied, and the jury should have been so instructed, that the seizure of the slaves, and the advertisement of them as stated on the trial, did place them in the custody of the Sheriff, subject to the limitation heretofore mentioned as to damages against him; that the agreement of the plaintiff's agent with Mayes, and the Sheriff consenting thereto, constituted Mayes the keeper of the property under the law; and that if he abused the possession he had, to run away with it, he was as culpable as if he had taken the slaves out of the actual custody of the Sheriff. In a moral sense he was more culpable, if possible; for, in addition to a breach of the law, he violated the confidence the parties reposed in his good faith and honesty.

The Judge was right in instructing the jury that, if they were satisfied that the defendant Berwick knew that the slaves were

advertised, and so knowing, did aid Mayes to run away with them to the injury of the plaintiff, they ought to find damages against him to the extent of the injury sustained by his act; but, if not satisfied, that they ought to find for the defendant. But the Judge should further have told the jury that if they believed that Berwick knew, or had good reason to believe, that it was the purpose of Mayes to defraud the plaintiff by running the slaves off to Texas, that then, whether he knew they were advertised or not, he is responsible in damages, if he assisted him; and that, in coming to a conclusion on this point, the jury should take into consideration all the circumstances, the time and manner of leaving, the relations existing between the parties, and every other fact that is proved, calculated to induce a conviction that he knew of the dishonest purposes of Mayes.

The jury should further have been instructed, that it is no excuse for the defendant Berwick, that he acted heedlessly or imprudently in the matter. Men are as responsible for their imprudence and negligence, as for other acts, if they cause damage, to another. In 1 Robinson 178, we decided that the owner of an omnibus was responsible for damage occasioned by the negligence, or want of skill, in the driver, or the vicious temper of the horses belonging to him. In the case of *Logan* v. *The Ponchartrain Rail Road Company*, we decided that the defendants were responsible for the negligence of their agents or servants, in not taking proper care of the plaintiff's baggage that was placed in one of their cars, whereby it was lost. If a man owns a vicious horse, and heedlessly rides him into a crowd of people, and he kicks one, and does him an injury, the party is responsible in damages. Many other cases could be cited, if the principle were doubtful; but it is not.

The counsel for the defendant Berwick, insists that, as the plaintiff is prosecuting a suit in Texas against Mayes, to recover his debt there, no action can be maintained in this state against Berwick, until such suit is decided. We are not of that opinion. If any thing has been made by the proceeding in Texas, the defendant, by showing the amount, will be entitled to a deduction on the damages, if he be held responsible for them. This question arose in the case of *Irish* v. *Wright, &c.*, decided in

July, 1844, which was a suit similar in many respects to the present.

As to the measure of damages, if the defendant be held responsible for any, we are of opinion that the full value of the slaves is the proper standard, if the debt of the plaintiff amounts to so much.

The jury found a verdict for the defendant, Berwick; but as we think it probable that the charge of the Judge in some degree contributed to that result, we are of opinion that it should be set aside, and the cause remanded for a new trial.

It is, therefore, ordered and decreed, that the verdict of the jury be set aside, the judgment annulled and reversed, and the cause remanded for a new trial, with directions to the Judge, in the trial thereof, to charge the jury in the manner stated in this opinion of the court, and, in other respects, to proceed according to law; the defendant and appellee to pay the costs of this appeal.

Voorhies and Olivier for the appellant.

Splane, contra.

Patrick M. Wilkins *v.* William H. Bassett.

Plaintiff sold defendant certain land, warranting it free from incumbrance, and taking notes from the latter, with a mortgage, for the price. Defendant resold it to a third person, also reserving a mortgage. The second purchaser failing to pay the price, defendant took out an order of seizure and sale, and the property was offered for sale, and a bid made for an amount exceeding that due from defendant to plaintiff, but no adjudication could take place, in consequence of plaintiff's failure to erase a mortgage in favor of a third person, which existed at the time of his sale to defendant. Plaintiff subsequently took out an order of seizure and sale on his mortgage, when, after several attempts to sell, the mortgage existing at the date of the first sale was erased by plaintiff, and the property sold for a sum much less than was offered at the sale under defendant's order of seizure. In an action by plaintiff to recover the balance due on defendant's notes, and plea in reconvention claiming damages for plaintiff's failure to erase the mortgage: *Held*, that the measure of the damages to which defendant is entitled, is the difference between the price for which the property actually sold, and that which might have been obtained had the mortgoge been erased at the proper time.

APPEAL from the District Court of St. Landry, *Boyce*, J.

GARLAND, J. This case was before us at the September term, 1843, of the court. See 5 Robinson, 492. The facts were then fully stated, and the case remanded for a new trial, that a jury might assess the damages. The case was again tried by a jury, upon the same evidence as given on the former trial. The jury, under a charge from the Judge, found damages for the defendant, on his demand in reconvention, for $250, which was directed to be deducted from the demand of the plaintiff, in whose favor a verdict and judgment were rendered, for the remainder of the demand, from which the defendant has again appealed.

Our attention has been called to a bill of exceptions, taken by the counsel for the defendant, to the refusal of the Judge to charge the jury, as to the measure of damages the defendant was entitled to recover. The counsel asked the court to charge the jury, that the difference between the highest sum bid for the property, sold by the plaintiff to the defendant, when offered for sale by the Sheriff, and the price for which it really sold, was the true measure of damages. This the Judge refused, and charged, "that Wilkins, the plaintiff, having sued out execution against Bassett, and caused the property to be frequently exposed at sheriff's sale; as it would not sell, in consequence of the mortgage of Wilkins in favor of Hathorn remaining on the records, and as it was the duty of Wilkins to remove this, and he had the power to do so, he, Wilkins, ought to pay the additional costs and damages, for any expense caused to Bassett, in consequence of this state of things. But though the property sold ultimately for much less at sheriff's sale, than it would have brought at an earlier period, this is rather to be attributed to the fall of property, and other causes. The obligation contracted by Wilkins in the sale, in consequence of warranty, or otherwise, does not make him responsible for this loss." To this opinion and charge of the Judge, the counsel for the defendant, also excepted.

We are of opinion that the Judge erred in giving the charge he did to the jury; but, at the same time, we think he ought not to have charged them as required by the counsel for the defendant. They contended, that the sum of $2500 was actually bid by

Martin for the property, but an inspection of the testimony will show, that the witness states such to be his recollection or impression, and seems not to be very positive. The Judge should have told the jury, that Wilkins was the warrantor of the title to the property sold to the defendant, and was bound to protect him in that title and the enjoyment of it. He had no right to do any act calculated to affect the validity of that title, or to cause it to be suspected, and thus depreciate the value of the property, at a time, when he knew it was in the market for sale, when suspicion even was calculated to affect its value. Had Wilkins been a third person, and in no way bound to warrant the title to Bassett, and had, without sufficient cause, slandered his title, and thus depressed the price of the property, he would most unquestionably have been responsible in damages. No one has a right, by false representations, to injure another, by alleging that he has no title to the property he professes to own, nor to depress its value, by causing his title to be suspected. This being true, as to a third person, how much more culpable was Wilkins, who knew that the defendant's title was good; who knew that no mortgage existed on the property, and had the evidence of the fact in his possession, yet refused to produce it. The law affords all reasonable facilities to creditors to enforce payment from debtors; but they must not use the remedies and facilities allowed them, in such a manner as to convert them into engines of oppression and damage.

The Judge should have told the jury that the true measure of damages was the difference in the price the property really sold for, and that which the weight of the testimony shows could have been obtained for it, if the mortgage in favor of Hathorn had not existed, or had been erased at a proper time. That value we think, according to the evidence, is the sum of $2000. Several witnesses say, that it was worth that sum, and would have sold for it, but for the existence of the mortgage in question. It was finally sold for $602. The difference between the two sums, to wit, $1398, is, in our opinion, the real damage sustained, for which sum, the defendant upon his demand in reconvention, is entitled to judgment.

As all the evidence is before us, that the parties can probably obtain, we deem it unnecessary to remand the case for further proceedings.

It is, therefore, ordered and decreed, that so much of the verdict as relates to the damages in favor of the defendant be set aside, and that the judgment based upon it be annulled and reversed; and our judgment is, that the damages in favor of the defendant be assessed at the sum of thirteen hundred and ninety-eight dollars ($1398,) which sum shall be applied to the extinguishment of the demand of the plaintiff, as far as it will go; to take effect on the 3d day of April, 1841. This sum being deducted, and other admitted credits applied, the balance in favor of the plaintiff is the sum of two hundred and ninety three dollars, and forty-eight cents, with interest at 10 per cent per annum, from the 3d day of April, 1841, until paid, for which sum and interest, a judgment is now rendered against the defendant, he paying the costs in the court below, and the appellee the costs in this court.

Splane, *Swayze* and *Taylor*, for the plaintiff.

T. H. and *W. B. Lewis*, for the appellant.

CONSTANCE FABRE and others, Heirs of Constance Sparks, *v.* DANIEL P. SPARKS.

Where it is stipulated by the first clause of a marriage contract, that "there shall be a community between the parties, which shall comprehend all their estate, real and personal, present and to come," and by a subsequent one that, "in case of the death of either the husband or wife, without having a child or children by the marriage, the amount of the property brought into the community by the one that shall die first, with the profits arising from the community, shall revert to the surviving husband, or wife, as the case may be," the words "*property brought into the community*," used in the latter clause, will be construed with reference to the first, which establishes what property the community shall consist of; and in case of the death of the wife without issue of the marriage, the surviving husband will be entitled to all the estate "real and personal, present and to come," of which, by the first clause of the contract, it is declared that the community shall be composed.

Fabre and others v. Sparks.

APPEAL from the District Court of St. Mary, *Boyce*, J.

SIMON, J. This action is instituted by the collateral relations and heirs at law of one Constance Etié, deceased, late wife of the defendant, for the purpose of recovering from the latter, who is in possession thereof, all the property belonging to the succession of the deceased, consisting in divers articles of real and personal property, slaves and sums of money, by her brought into and inherited during the marriage; and of her half of the *acquets* and gains made during the said marriage.

The petition avers, that the defendant claims to be the owner of the estate of the deceased, under and by virtue of a certain instrument of writing purporting to be the last will and testament of his late wife, which has been annulled and avoided by a judgment of this court, as a nuncupative testament by public act,* and which is also null and void as a nuncupative testament under private signature, for divers reasons stated in the petition.

The defendant joined issue, by alleging, first, that he is the owner and possessor of his wife's estate by good and valid titles. He further sets up, that under the clauses and stipulations contained in the marriage contract, passed between him and his late wife on the 23d of June, 1818, in which the parties thereto mutually agree that all the property then owned, or that should be thereafter acquired by either of the parties in any manner whatsoever, should belong to the survivor, in case there should be no children born during the marriage; and there having been no issue from the said marriage, he is entitled to all the property, rights and credits left at her death by his late wife.

He further bases his claim to his wife's estate upon two testaments, executed at two different periods in the intended form of nuncupative testaments by public acts, but which are good and valid as nuncupative testaments under private signature, and in which his said wife instituted him her universal heir and legatee.†

The Judge, *a quo*, being of opinion that the testaments pro-

* See the case of the *Succession of Sparks, infra.*

† There was no issue of the marriage.

duced were invalid and informal as acts under private signature, but that the fifth clause of the marriage contract, passed in 1818, should have its effect so far only as being a mutual donation of the property then brought into the community by the spouse who should die first, and of the profits arising therefrom, ordered that the defendant should retain in his possession all the property owned by his wife on the day of the marriage as specified in the marriage contract, and all the profits made subsequently therefrom and by the joint industry of both; and that the plaintiffs should recover all property given to, or inherited by the deceased, after the date of the said marriage contract; and from this judgment the defendant has appealed.

The first clause in the marriage contract stipulates that, "*there shall be a community between them, the said parties, which shall comprehend all their estate, real and personal, present and to come.*" The second establishes the amount brought in by the husband. The third specifies the property owned by the wife at the date of the marriage, and which is *then* brought into the community.

The fourth says: "In case there shall be a child or children produced by the said marriage, and either the said future husband or wife shall die, *the property brought into this community* by the one that shall die first, together with the profits arising out of this community, shall be equally divided between the surviving husband, or wife, as the case may be, and the children of said marriage."

And the fifth is in these words: "In case of the death of either the husband, or wife, without having a child or children by the marriage, the amount of *the property brought into this community* by the one that shall die first, with the profits arising from this community, shall revert to the surviving husband or wife, as the case may be."

We cannot agree with the Judge, *a quo*, in the opinion that the general expression of the first clause of this marriage contract in relation to the future property of either of the spouses, is counteracted or modified by what he calls the more special expressions of the fourth and fifth articles. The latter are necessarily to be governed by what the parties understood in the first

clause to compose the community therein stipulated. Such community is to comprehend all their estate, real and personal, present and to come; and when, in the subsequent clauses, they stipulated that the property brought into the community by the one that shall die first, should be equally divided between the surviving spouse and the children of the marriage, or in case of there being no issue from said marriage, shouldrevert to the surviving husband or wife, they must have understood the words, "*property brought into this community*," with reference to what they had previously said should compose that community, to wit, "*all their estate real and personal, present and to come.*" The two last clauses are to take their effect only at the death of either of them, and it seems to us, that the words, "*brought into*," taken in the sense which they must have, not at the time of the marriage, but at the time of its dissolution by the death of one of the parties, refer to the whole commnnity; that is to say, to all the property of which it is composed; wherein, under the first clause, is necessarily included the property brought into it at any time by either of the spouses.

We are bound to give effect to all contracts according to the true intent of the parties; and such intent is to be determined by the words of the contract, when they are clear and explicit. Civ. Code, art. 1940. One of the rules of interpretation of contracts is, that where there is a doubt as to the true sense of the words of a contract, they may be explained by referring to other words or phrases used in making the same contract. Civ. Code, art. 1943. The true meaning of its terms should be looked for by endeavoring to ascertain what was the common intention of the parties. Civ. Code, art. 1945. And all clauses of agreements are to be interpreted the one by the other, giving to each the sense that results from the entire act. Civ. Code, art. 1950. Here then, if there was a doubt as to the extent of the word "*brought*," used by the parties in clauses which cannot have any legal effect before the period of the dissolution of the marriage, it should be construed in reference to, and in connection with the first clause, which is positive in its terms, and which fixes in a definite manner what property the community is to be composed of; and thus it is clear to our minds, that the

parties never intended that any of the property by them brought respectively into the community during the marriage, should be excluded from its mass, when, after its dissolution, such property, under the fourth article, is to be equally divided between the surviving spouse and the children of the marriage; or, according to the fifth clause, is to revert to, (to go to, or to be kept by,) the surviving husband or wife, as the case may be. This view of the marriage contract, renders an inquiry into the validity of the testaments unnecessary.

It is, therefore, ordered and decreed, that the judgment of the District Court, be annulled and reversed, and that ours be wholly in favor of the defendant, with costs in both courts.

Voorhies and *T. H. Lewis*, for the plaintiffs.

J. P. Conrad and *Splane*, for the appellant.

SUCCESSION OF CONSTANCE SPARKS.—Marcelite Miguez and others, Heirs, Appellants.

It is essential to the validity of a nuncupative will by public act that it be expressly stated in the instrument that it was read to the testatrix in the presence of the necessary witnesses. C. C. 1571, 1588. Thus where the will states; "*Que la dite comparante testatrice a dicté ses dernières volontés, en présence de* [mentioning three witnesses,] *tous trois de l'âge de majorité et domiciliés dans cette paroisse, écrit de suite par moi, le dit juge, sans interruption et sans divertir à d'autres actes. Alors j'ai lu le dit acte, à la dite testatrice; qui á déclaré qu'elle le comprenoit, et qu'elle l'approuvoit dans tout son contenu. Dont acte fait, &c.*" —it will be declared invalid as a nuncupative will by public act, reserving the right to those interested, of establishing its validity as a nuncupative testament by private act. C. C., 1583.

APPEAL from the Court of Probates of St. Mary, *Palfrey, J.*

SIMON, J.* This is an appeal from a judgment, ordering the last will or testament of Constance Etié, deceased, to be executed and

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* This case was decided on a re-hearing, at Opelousas, in September, 1842. The original opinion pronounced on the first hearing of the case, prepared by GARLAND, J., was lost in the clerk's office, of the Supreme Court of Opelousas; and the publication of the case has been delayed in the hope of obtaining either the original or a copy; but it appears that the opinion was never recorded in the office of the clerk

recorded according to law. Said judgment was rendered contradictorily with the legal heirs of the testatrix, on their opposition to the granting of the prayer of D. C. Sparks' petition, who, as universal legatee or instituted heir of his deceased wife, had made application to the Court of Probates for an order to carry the said will into execution according to the dispositions therein set forth.

Among the divers grounds upon which the appellant's opposition is based, there is one which, in our opinion, must prevail. It is, that the will does not show on its face that it was read to the testatrix in presence of the witnesses, as no mention is made of the same in any part of the testament.

The instrument which was presented to the court, *a qua*, as being the last will of the deceased, was made in the form of a nuncupative testament by public act. The notary who received it, closed it in the following words: "*C'ést ainsi que la dite comparante testatrice a dicté ses dernières volontés, étant dans son bon sens, en présence de Sylvorin Salles, Joshua Baker, et William Knight, tous trois de l'âge de majorité et domiciliés dans cette paroisse, écrit de suite par moi, le dit juge, sans interruption et sans divertir à d'autres actes. Alors j'ai lu le dit acte à la dite testatrice, qui a déclaré qu'elle le comprenoit, et qu'elle l'approuvoit dans tout son contenu. Dont acte fait et passé, &c.** The will was signed by the testatrix's making her ordinary mark, and by the three witnesses therein named.

It is one of the essential requisites of the law with regard to the form of a nuncupative testament by public act, that *it should be read to the testator in presence of the witnesses*, and that *express mention should be made therein of the manner* in which

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of the Supreme Court, nor was any copy of it ever sent to the court of the first instance. The record was placed by the reporter, in the hands of Judge GARLAND for the purpose of preparing such a sketch of the original opinion, as would be necessary to explain that pronounced on the re-hearing. The record remained in his hands more than two years; but the reporter was never able to obtain any such sketch. After Judge G. left the bench, SIMON, J., by whom the opinion on the re-hearing was delivered, prepared the paper which is here published.

* *En présence des témoins susdits qui ont signé ces présentes, avec la dite testatrice, &c.*

the formalities, upon which its validity depends, have been fulfilled. Civ. Code, art. 1571. Those formalities must be observed, and the non-compliance with any one of them, is sufficient to invalidate it. Civ. Code, art. 1588. Now, can it be even inferred from the declaration of the notary here, that the will of Mrs. Sparks was read to her in presence of the three witnesses who attended its execution? The notary declares, that it was dictated to him, in the presence of the witnesses; that it was written by himself, without interruption, and without turning aside to other acts; but he only states that *he read the act to the testatrix*, who declared that she understood it, and approved it in all its contents. This is clearly insufficient. He should have made express mention of the fact that the testament was read to the testatrix in presence of the witnesses; as, although such fact may exist, and it might be in the power of the party to establish it by parol testimony, it is a well settled doctrine, that a testament must bear on its face the evidence of a strict compliance with the legal formalities, and that no parol proof can be admitted to show that such formalities, not apparent from the instrument itself, have been really fulfilled. *Lablanc* v. *Barrors' Heirs*, 16 La. 80.

We conclude, therefore, that the testament under consideration, is not in a sufficient legal form, to have effect as a nuncupative will by public act, and that the Judge, *a quo*, erred in ordering it to be carried into execution as such.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be annulled, and reversed; that the appellants' opposition be maintained; and that the will of Constance Etié, deceased, be and the same is hereby declared null and void as one by public act, with costs in both courts.

Splane, for the universal legatee.

T. H. Lewis and *Voorhies*, for the appellants.

SAME CASE.—ON A RE-HEARING.

The fact that a nuncupative will, by public act, was read to the testatrix in the presence of the necessary witnesses, must appear from the instrument itself. The words in which the statement is made, are immaterial, provided they be such as to leave no doubt that the formality was complied with.

Splane, for a re-hearing. The will should be maintained as a nuncupative testament by public act. The case of *Seghers* v. *Antheman*, (1 Mart. N. S. 73,) is directly in point. That case was decided under the Code of 1808; but the law in relation to donations, *mortis causa*, was not altered, in this respect, by the Code of 1825. The language of the will shows that it was read to the testatrix in the presence of the witnesses. The notary, after stating that it was dictated in the presence of the witnesses, and written as dictated in their presence, adds, *then* (*alors*) I read the said acts to the said testatrix, who declared, &c. To what time does the word *alors* refer, if not to the period when the will was dictated. Can it be presumed that the witnesses had absented themselves? Is the conclusion not irresistible that the witnesses were present when the will was read? Where an expression is susceptible of two meanings, it should be understood in that sense which will give it effect. See 5 Toullier, No. 430, p. 408.

The testament states, that it was dictated in the presence of the witnesses, written in their presence—then read to the testatrix—and then follows the clause reciting that it was done and passed in the presence of the witnesses. To conclude that the witnesses were not present, when the will was read to the testatrix, it must be inferred that they absented themselves between the time of writing the first part of the will, and the writing of the clause, "Done and passed, &c.;" for the reading is stated to have taken place between these periods. Which is the most reasonable conclusion—that the witnesses absented themselves during the reading of the will, or that they remained?

In any event, the will is good as a testament by private act.

Simon, J. We were induced to grant a re-hearing in this case, from the doubt which we entertained, whether the word "*alors*," used by the notary in the closing of the will, and immediately following the words "*écrit de suite par moi*, &c.," and preceding the words "*jai lu le dit acte à la dite testatrice*," did not sufficiently indicate that the will had been read to the testatrix by the notary, in the presence of the witnesses. We thought, from the expression "*alors*," written between the sentence in which the notary declares that the will was dictated to him in

the presence of the witnesses, and that part in which he says that he read it to the testatrix, that it might perhaps be fairly inferred, that the dictating, writing, and reading of the will, had been done altogether in the presence of the witnesses; but we have been unable, however reluctant we may feel to annul a will for the want of a formality, which, at the first blush, appears to be of a trifling and unimportant nature, to come to a conclusion different from that contained in our first opinion. The law is imperative, that the mention of the reading of the will to the testatrix, in the presence of the witnesses, must be express; and although the rule has been relaxed so far as to be now settled, that if the proof of the reading of a will to the testator, in the presence of the witnesses, is furnished by the testament itself, it is immaterial *in what words* that proof is furnished, still some words must be used, from which the fact may be inferred, that the formality was complied with, and such inference should be so conclusive, and so certain, as to leave no doubt, in the mind of the court, that when the will was read to the testator, the witnesses were present. In this case, it is, in our opinion, impossible to draw such an inference.

The case of *Seghers* v. *Antheman*, (1 Mart. N. S. 73,) relied on by the defendant's counsel, does not seem to support him. In that case, the following sentence occurred at the close of the will: "*C'est ainsi que ce testament a été fait en présence des sieurs, &c., tous trois témoins, &c., et lecture faite de ce que dessus, la testatrice en présence des témoins nous a déclaré*, &c." In that case, the question was not, whether, when the will was read, the witnesses were present, but whether, when it was so read to the witnesses, the testatrix was present, or, in other words, whether it was read *to her?* In this case, on the contrary, the question consists in ascertaining from the expressions used in the will, whether the witnesses were in attendance when the will under consideration was read to the testatrix by the notary. It is clear that this will was read to the testatrix, who declared that she understood it, and approved it in all its contents; but, as we have already said, this statement does not include the idea that the witnesses were there when it was so read, although she may have made the subsequent declarations in their presence; and the ex-

pressions used in the said will, do not satisfy us, on this important requisite of the law.

It is contended, however, that the will is good as a private act, and that the case should be remanded to the lower court, in order to afford to the defendant, an opportunity of showing that a greater number of witnesses, than are mentioned in the will, could not be had, the same having been made in the country. This, we think, cannot be done. There is no issue between the parties, on this point, and we cannot remand a case to be tried, *de novo*, on any other issue, than those presented by the record, and the pleadings therein contained. We are of opinion, however, that justice requires that the defendant's legal right to show that the will in question is good as a private act, should be reserved, (Civ. Code, art. 1583,) and that the present judgment ought not to prejudice the validity of the will, if it can be established in any one of the other forms prescribed by law.

Our first judgment is, therefore, maintained, reserving to the defendant the right of showing, hereafter, that the testament here annulled as one made by public act, is valid, as a nuncupative will by private act.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN THE

WESTERN DISTRICT, AT ALEXANDRIA, OCTOBER, 1845.

PRESENT:

HON. HENRY ADAMS BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.

ISAAC W. ARTHUR and another *v.* EDWARD COCHRAN, Tutor of the Minor Heirs of Daniel C. Morris, deceased.

A judgment by default taken on the fifth day after service of citation on the defendant, and afterwards confirmed, is illegal and null. C. P. 180, 310.

A succession cannot be accepted for minor heirs, but with the benefit of inventory; and no portion of the estate can come into their possession, until it has been administered upon in due course of law, when, whatever may remain after the payment of the debts, will fall under the administration of their tutor. C. C. 1051.

Tutors of minor heirs are not entitled, *ex officio*, to administer successions accruing to their wards. They may claim the administration, where there are no beneficiary heirs of age, in preference to any other person; but they must give security, and qualify as other administrators. C. C. 1034, 1037.

Persons holding claims against a succession cannot sue the tutor of the minor heirs, and obtain a judgment against him for debts due by the deceased. Where no executor or administrator has qualified, they must provoke the appointment of an administrator, against whom, as the legal representative of the estate, they may institute suit. C. C. 1031 to 1060. C. P. 974 to 996.

APPEAL from the District Court of Concordia, *Curry*, J.

Morphy, J. This suit was brought in the Court of Probates of the Parish of Concordia by the petitioners, who allege that, on the 12th of April, 1839, they obtained a judgment against Daniel C. Morris for $1566, with interest at eight per cent per annum from the 17th of March of the same year until paid. That since the rendition of this judgment, Daniel C. Morris has died, leaving minor heirs; that his estate is administered by Edward Cochran, as tutor of said minors; that said tutor, by order of the Probate Court, has sold the property belonging to the succession; and that, although often requested so to do, he has not paid to the petitioners the amount of their judgment, nor accounted for the moneys arising from said sale. The petition concludes with a prayer that Edward Cochran be cited to render a just and full account of his administration of said succession as tutor of said minor heirs, and that he be ordered to pay to the plaintiffs the amount of their judgment against Morris, or so much thereof as may be their just proportion in the distribution to be made among the creditors of the succession. Service of this petition and of a citation was made on the defendant, on the 19th of May, 1842. The Probate Judge having excused himself on the ground that he had been counsel for the plaintiffs in obtaining their judgment, the case was transferred to the District Court for further proceedings. On the 24th of May, 1842, a judgment by default was entered up against the defendant, which was confirmed on the 31st, decreeing that the plaintiffs should recover of the defendant as tutor and administrator of the succession of Daniel C. Morris, $1566, with interest at eight per cent per annum from the 17th of March, 1839, and the costs of suit, and that the defendant should render the account prayed for within sixty days, and pay to the plaintiffs such amount as may be their proportion of the assets of said succession. This judgment was served upon the defendant on the 25th of June, following. At the December term of the same year, the plaintiff moved for and obtained an execution against Cochran, on the ground that he had failed to render his account of the condition of said succession, as ordered by the court at its last term. A motion was made a few days after, by the defendant, to set aside the judgment or order, directing an execution to issue against

him, the same being illegal, null, and void. No action appears to have been had on this motion, but the defendant took the present, a suspensive, appeal from the judgment rendered against him, and the order authorizing an execution to issue under it.

It is clear that the judgment by default taken on the 24th of May, 1842, when process of citation had been served on the defendant, only on the 19th, five days before, was illegal and null. Code Prac., arts. 180, 310. With this judgment must fall the whole of the subsequent proceedings. We would remand the case to be further proceeded in below, were it not apparent from the petition itself, that the plaintiffs have not the right of action which they seek to enforce. They allege themselves to be judgment creditors of Daniel C. Morris, and they call upon the defendant, as tutor of the minor heirs of the deceased, to render to them an account of his administration of the succession. It is not pretended that the defendant has ever been legally appointed administrator of the estate, but only that, as tutor of the minors, he is administering it. Without such an appointment, the tutor of the minor heirs of an estate cannot be considered as its legal representative, and be sued as such in the Court of Probates, for debts due by the deceased. He is only authorized by law to administer the property of his wards. When a succession is opened in their favor, it cannot be accepted for them, but with the benefit of inventory; it cannot be said to be their property, and it does not legally come to their possession as beneficiary heirs, until it has been administered upon in due course of law. Whatever remains after the payment of the debts of the succession belongs to them, and falls under the administration of their tutor as such. Civ. Code, art. 1051. Tutors have not, *ex officio*, the right to administer successions accruing to their wards. Their office only entitles them to a right of preference over every other person who might claim the administration, when there are no beneficiary heirs of age; but, like any other person, they must give security, and qualify as such. Civ. Code, arts. 1031, 1032, 1034, 1037, 1040. Persons, then, holding claims against an estate must provoke the appointment of an administrator, against whom, as the legal representative of such estate, they may bring their suits. They cannot sue the tutor of the minor

heirs, and obtain judgments against him, as such, for debts due by the deceased. If they could, they would render unavailing for the protection of minors those provisions of law which declare that they cannot accept a succession but with the benefit of inventory, as their separate and individual property might be affected by judgments against their tutor for debts due by an insolvent estate. Civ. Code, arts. 1031 to 1060. Code Prac., arts. 974 to 996. 4 La. 202; 5 La. 384; 17 La. 106. 1 Robinson, 407; 3 Robinson, 30. See also cases of *Picou* v. *Dussuau et al.*, (4 Rob. 412,) and *Self* v. *Morris*, (7 Robinson.)

It is, therefore, ordered that the judgment of the District Court be reversed, and that defendant be dismissed, with costs, in both courts.

Shaw, for the plaintiff.

Stacy and *Sparrow*, for the appellant.

JOHN H. KELLAM *v.* JOHN RIPPEY.

Where a jury, in ascertaining the amount to which a defendant is entitled for improvements made by him which have enhanced the value of the land recovered by plaintiff, charge the latter with the buildings erected on the land, at a high estimate, as necessarily enhancing the value of the soil, without affording him an opportunity of availing himself of the choice given by art. 500 of the Civil Code, the verdict will be set aside.

APPEAL from the District Court of Carroll, *Curry*, J.

BULLARD, J. This case was remanded at a former term of this court, (see 3 Robinson, 138,) for the purpose of ascertaining the amount to which the defendant is entitled, for such improvements put by him upon the plaintiff's land, as have enhanced its value, after deducting the rents since the inception of this suit. It was tried by a jury, and on the first trial, the jury not being able to agree, it was submitted to a second jury, who found the value of the improvements to be $2433, the rents to be deducted $600, leaving due to the defendant $1833, for which sum judg-

ment was rendered in favor of the defendant against the plaintiff, and the latter appealed.

The tract contains only one hundred and sixty American acres, and the whole land cleared and rendered fit for cultivation does not exceed, according to the evidence, forty acres, thirty of which were cleared before the suit was brought. It is shown that it is worth about twenty dollars per acre to clear land well. With respect to buildings put upon land, they are placed by the Code upon a different footing. See art. 500. It leaves it to the option of the owner to retain the buildings, and to pay merely the price of the materials and the costs of construction, or to require their demolition. In the case now before us, it is clear that the owner has been charged in the verdict for the buildings, at a high estimate, as constituting, necessarily, an enhanced value of the soil; and that too, without affording him an opportunity to avail himself of the choice given him by the Code.

The principles which we think ought to govern in this class of cases, are explained in the case of *Pearce et al.* v. *Frantum*, (16 La. 414,) and we find in the verdict of the jury in this case a wide deviation from those principles. The amount found against the plaintiff is nearly, if not quite, as much as the whole tract is worth; and yet only a small clearing has been made. While we are bound to carry out the equitable principle, that no one should enrich himself at the expense of another, we ought not to forget that the principle applies as well to the defendant as to the plaintiff, and that the owner is to be protected in his property against exorbitant demands.

It is, therefore, ordered, that the judgment of the District Court be reversed, and the verdict set aside, and that the case be remanded for a new trial; the costs of the appeal to be paid by the appellee.

Willson, for the appellant.

Selby, for the defendant.

Bernard Hemken *v.* William Brittain.

Where a plaintiff claims to be the owner of land which he alleges that the defendant has taken possession of and refuses to deliver, and prays for a judgment for the land with damages for its detention, he must prove his own title, and show that it covers the land in the adverse possession of the defendant.

Proceedings in an action of partition, cannot be offered in evidence against one not a party to the action. Nor will the fact of his not having exhibited any title, or plat of survey, to the surveyor engaged in making such partition, though aware of the proceedings, affect his rights. He was not bound to exhibit any evidence against himself, and had a right to stand upon his possession.

Appeal from the District Court of Ouachita, *Curry*, J.

McGuire and *Ray*, for the appellant.

Downs, for the defendant.

Bullard, J. This is a petitory action in which the plaintiff asserts title in himself to a tract of land of four hundred acres, being lot No. 4 in a survey of 2000 acres in Hunter's claim, lying upon the bayou Barthelemy, in the parish of Ouachita, which he alleges he acquired by purchase from Joseph H. Patten, but which he alleges the defendant has taken possession of and refuses to deliver up.

The defendant after praying oyer, and having inspected the plaintiff's title deeds, answered by a general denial of the facts and allegations in the petition. For further answer he says, that the land on which he resides, and which is not the same called for by the plaintiff's titles, he acquired by a *bona fide* title, translative of property, on the 1st of February, 1815, when it was sold by the Collector of taxes as the property of Jesse Collier, and that he has remained in the quiet and uninterrupted possession ever since, and is entitled to hold by prescription.

There was a verdict and judgment for the defendant, and the plaintiff has appealed.

The description of the land sued for, as contained in the deed from Patten to the plaintiff, is as follows:—A tract or parcel of land, situated in the said parish, on or near the bayou Barthelemy, containing the quantity of four hundred *arpents*, being an undivided half of eight hundred *arpents*, conveyed to the vendors by James G. Hunter, which eight hundred *arpents* was an un-

divided half of sixteen hundred *arpents*, conveyed to said James G. Hunter by Oliver J. Morgan, without any warranty. The land is further described as being a part of ten thousand acres conveyed to James G. Hunter, sen., by Abraham Moorhouse, now deceased.

In the conveyance from Moorhouse to Hunter, the tract of ten thousand *arpents* is described as beginning at the said Moorhouse and Livingston's corner of division lines of the courses North 33, West and South 57 degrees, from thence one thousand poles on such division line to a stake, thence at right angles one thousand poles from such stake, to include ten thousand *arpents* of land in a square, being part of the grant known by the name of the Baron de Bastrop's large cession of twelve leagues square.

It is an obvious principle, that the plaintiff must not only show title in himself, but must show that his title covers the land in the adverse possession of the defendant. We have searched the record in vain for any location of the plaintiff's land, made either in conformity to the calls of his deed, or in such a manner as to be conclusive on the defendant, showing that any part of the land possessed by the defendant is embraced in the plaintiff's purchase. It is equally obvious, that the proceedings in the action of partition between the present plaintiff, Morgan and others claiming the two thousand acre tract, are not conclusive upon the defendant who was not a party.

The plaintiff's counsel tells us, that Clarke, the surveyor, notified the defendant, and even stopped at his house while making the survey; yet he furnished him no titles or plat of survey; and he refers us to a plat of survey made by Daniels, under an order of court in the partition case. He therefore contends that, there is a title and designation of lines by order of court in favor of the plaintiff, for the particular land claimed; and that, on the contrary, there is no designation of land belonging to the defendant, who would not comply with the order of court to have it surveyed.

The defendant was not bound, in our opinion, to exhibit to the surveyor any evidence against himself. He had a right to stand upon his possession, and to require of the plaintiff to show

that the land occupied by him, or any part of it, is embraced in the plaintiff's purchase. This, we think, he has failed to do.

Judgment affirmed.

THE STATE *v.* ISAAC THOMAS and another, Executors of Micah P. Flint.

THE STATE *v.* THOMAS NEAL.

The act of December 21, 1814, imposing a penalty on any proprietor of a plantation, or agent of a proprietor, who shall neglect to keep on such plantation at least one white person for every thirty slaves working thereon, does not create an indictable offence. It contemplates not a criminal, but a civil proceeding, by motion of the district attorney, for the recovery of the fine. But where the district attorney proceeds by indictment, and, after a true bill found by the grand jury, and a conviction of the offender, makes a written motion, referring to the indictment and proceedings had thereon, making them a part of his motion, and prays for a judgment for the penalty, the motion for the recovery of the penalty will not be vitiated by the previous indictment and conviction; and, where the facts proved or admitted in the record make out the case under the statute, the indictment, arraignment and trial will be disregarded as merely useless.

APPEALS from the District Court of Rapides, *King*, J.

Barry, District Attorney, for the State, contended that the Supreme Court was without jurisdiction, the statute of 21st December, 1814, having made the offence a criminal one, citing *Markham* v. *Close*, 2 La. 581.

Thomas and *Flint*, for the appellants. The offence is not an indictable one. 1 Russell on Crimes, p. 53. 1 Chitty's Criminal Law, p. 163. 10 Petersdorff's Abridgment, title Indictment, pp. 307, 308. The case of *Markham* v. *Close* has no resemblance to the present, and the decision is inapplicable here.

BULLARD, J. The act concerning the police of slaves in certain cases and for other purposes, provides, among other things, that "any person being the proprietor of a plantation, or acting for the proprietor of a plantation, on which he employs slaves for the cultivation of the soil, shall be bound to have, permanently on

his plantation, or on the plantation which he oversees, a white person for every thirty slaves working on said plantation, to oversee the said slaves, and maintain a good police among them." Sect. 1.

The third section provides, that "any planter who shall not comply with the provisions of the act, shall, on conviction thereof, be condemned to pay a fine, not less than $100, and not exceeding $500, *to be recovered on motion* of the Attorney of the District within which the said offender may reside, one half to the benefit of the informer, and the other to the parish in which the said offender may reside." B. & C.'s Digest, p. 65.

Bills of indictment were found by the grand jury of the parish of Rapides against Thomas Neal, the manager of the plantation belonging to the heirs of Linton, and against Thomas and Flint, executors of the last will of M. P. Flint, and who had the management of a plantation belonging to the estate, for neglecting to comply with the requisitions of the statute, and they were found guilty.

After verdict the District Attorney entered a formal written notice, in which he represents to the court, that the defendants have been duly convicted under the statute, and he prays for judgment against each defendant, for the sum of $500, and that the same may be recovered according to the provisions of the act of the Legislature in that case made and provided. The indictment, and proceedings had thereon, are particularly referred to, and made part of the motion.

Judgment was accordingly rendered on the motion, against each of the defendants for $100, and they were therefrom allowed an appeal to this court.

It has been urged that this statute does not create an indictable offence, and we find no difficulty in coming to that conclusion, as the statute provides a special manner of proceeding by motion of the District Attorney, and no part of the fine or penalty goes to the state. It is true the statute speaks of conviction, but any legal evidence of the fact of neglect, satisfactory to the mind of the court, and sufficient to sustain the motion of the District Attorney, would suffice without a formal indictment and verdict of the petit jury. It is no where made the duty of the court to

give this statute in charge to the grand jury. The statute itself does not seem to contemplate a *criminal*, but rather a *penal* proceeding; for the second section of the same act makes it the duty of the Parish Judge to visit the plantations, at least twice a year, on which there are more than thirty working slaves, in order to secure the faithful execution of the law; and it directs that he shall make use of the declaration annually made by every slaveholder, to ascertain whether the said slaveholders have faithfully complied with the provisions of the said section.

This case differs materially from that of *The State* v. *Williams*, lately decided in the eastern district, in which we held that the statute prohibiting the importation of slaves convicted of certain infamous crimes, does create an indictable offence.

In the case now before us, we think that the regulation of police in question, gives a civil penalty, to be recovered on motion by the District Attorney.

But we do not think the precaution taken by the District Attorney to proceed under the sanction of the grand inquest of the parish, and to procure a previous verdict of a traverse jury, thus making most manifest the fact of the delinquency, vitiates the proceeding as a civil one, on motion for the recovery of the penalty. Such a motion might have been made on the mere volition of the District Attorney; and supported by the evidence in this record, independently of the verdict of the traverse jury, must have prevailed. We have in the record the essential forms of proceeding for the recovery of the penalty, and may lay aside as useless the indictment, arraignment and trial. *Utile per inutile non vitiatur.* The facts proved and admitted in the record fully make out the case under the statute.

Judgments affirmed.

William M. Lambeth and another *v.* Montfort Wells and another.

A debtor of plaintiffs proposed to sell to them his crop of cotton, the proceeds to be deducted from his debt. Plaintiffs were to give the current price for the cotton, and the sale was intended to be by weight. Plaintiffs' agent went to the debtor's plantation, where he found in the gin and cotton-house a quantity of cotton in the seed, which the debtor told him, in the presence of witnesses, that he then delivered to him for his principals. The cotton was left on the place to be *ginned*, and pressed into bales. When a part had been put into bales, the agent marked them with plaintiffs' initials, and had them hauled to the river for shipment, and while there they were seized under a *fi. fa.* at the suit of another creditor; and the remainder of the cotton on the plantation was seized at the same time, under the same writ. The cotton had not been weighed; the keys of the building in which the *unginned* cotton was, had not been delivered to plaintiff's agent; nor was it proved that it could not have been removed. In an action by plaintiffs against the seizing creditor and the sheriff: *Held*, that the sale was incomplete as to third persons, for the want of delivery. C. C. 2433, 2442, 2452, 2453.

A parol agreement to sell personal property, cannot protect it from seizure, where there has been no legal delivery.

Appeal from the District Court of Rapides, *Campbell*, J.

Brent and *O. N. Ogden*, for the plaintiffs. The sale from Gray to the plaintiffs was complete. C. C. 2414, 2453. The sale cannot be treated as a nullity, and the property seized as belonging to the vendor; there must be a revocatory action. 9 Mart. 649. 3 Ib. N. S. 338. 5 Ib. N. S. 361, 634. 6 Ib. N. S. 140. 14 La. 189.

Elgee, for the appellant. There was no sale. The cotton was at Gray's risk, never having been weighed, (Civ. Code, art. 2433,) and *res perit domino*. There was no price fixed. Ib. art. 2439. Nor did the transaction amount to a *dation en paiement*, it being of the essence of this contract that there be an actual, not a symbolical delivery, as well as a fixed price. 10 La. 151. Besides Gray being insolvent, could not make a *dation en paiement*. Civ. Code, arts. 2625, *et seq.*

Garland J.* The plaintiffs allege that they are the

* This judgment, and the four preceding, were pronounced in October, 1844, but did not become final, by the lapse of three judicial days, until the present term.

owners of twenty-five bales of cotton, marked L. & T.; also of a quantity of *unginned*, and *ginned* cotton, in the gin and cotton-house on the plantation, where Wm. L. Gray and his wife reside; that they purchased the same of said Gray and wife, and, took possession of it, by their agents, who hold it for their use and benefit. They say that the *unginned* cotton was left on the plantation for the pnrpose of being *ginned* and pressed, it not being, at the time of its delivery, in such a state as to enable them to remove it. They further allege that, notwithstanding their right and title to this property, the Sheriff has, under an execution issued in favor of Montfort Wells, seized and taken all the aforesaid cotton into his possession, and threatens to sell the same, and that he will do so, unless restrained; wherefore the petitioners ask for an injunction, and that the property be adjudged to them.

The defendants deny that the cotton is the property of the plaintiffs, and pray for a dissolution of the injunction, with damages, &c.

The facts of the case are, that Gray and wife, the debtors in the execution, were largely indebted to the plaintiffs. In December, 1842, Gray applied to the agent of the plaintiffs, to know if he would purchase his crop of cotton for the plaintiffs, and give him credit on the debt he was owing to them. The agent agreed to do so; and it was stipulated that the plaintiffs should give Gray the current price in New Orleans for the cotton, it being understood as a sale by weight; and that credit should be given for it on the obligation held by plaintiffs. As soon as this was agreed to, the general agent of the plaintiffs in the parish, selected Mr. Texada as his agent to receive the cotton; and, in the presence of Gray requested him to do so, and gave him a written procuration to that effect accordingly. Texada the next day, with two of the neighbors of the parties, went to the plantation of Gray, and in the gin and cotton-house, found a quantity of cotton in the seed, which they estimated would make about eighty bales, when Gray told them that he then delivered the cotton to Texada, as agent for the plaintiffs; and upon being asked what he had gained by such a sale, he said he had gained the risk of keeping the cotton; and, that if it should be lost, he would hold the plaintiffs

responsible for it. The witnesses say that the sale was spoken of publicly; and Texada says, that he did not consider it a *sham* sale, but as a real transaction. The cotton was not removed from the place, but left to be *ginned* and pressed into bales by Gray. When twenty-five bales had been *ginned* and packed, Texada put the initials of the names of the plaintiffs on them; and Gray had them hauled to the usual landing on Red River, to be sent by the first steamer that should pass to New Orleans. While they were there, the sheriff seized them under the execution in favor of Wells; and, at the same time, seized all the *unginned* cotton on the plantation. Mr. Ogden the agent of the plaintiffs, exhibited, on the trial, his power of attorney which is a very general one, in relation to the means he can use to collect the debts owing to the plaintiffs on Red River; but it does not contain an express power to purchase property for his principals, which we do not in the present case consider material. Some short time after the bargain he had made with Gray, he informed his principals of it, and they have not disapproved of his act.

The court below, at first dissolved the injunction, with heavy damages, but granted a new trial; and when the case was heard again, the injunction was maintained for the proceeds of the sale of the twenty-five bales of cotton, and dissolved as to the *unginned* cotton; the whole having been sold by consent, and the proceeds in deposit made to represent the cotton itself. From this judgment, the defendant Wells has appealed; and the plaintiffs in this court pray, that it be so amended, as to give them the proceeds of the *unginned* cotton.

That the agents of the plaintiffs and Gray were acting in good faith in this transaction, we have no doubt; and we have endeavored to bring our minds to the conclusion, that the judgment of the inferior court was correct; but after as mature consideration as we have been able to bestow on the case, we are unable to come to that result.

The sale between the parties was no doubt good, as soon as there was an agreement for the price and the object; and each party had a right to compel the other to perform the contract, by delivering the property in the manner directed by law. But the question at once arises, whether it is perfect as to third persons;

and we think it is not, until there is a delivery in some of the modes the law directs. The sale in this case was by weight. The purchaser was to give the current price per pound, for the cotton. It is not usual to sell that kind of produce in a lump (*en bloc ;*) and here it is not pretended that such was the contract. Article 2433 of the Code, says that, " when goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things sold are at the risk of the seller, until they are weighed, counted, or measured ;" but the buyer may, in virtue of the agreement, compel a delivery. But if the thing has been sold in a lump, then the sale is perfect, although there is no delivery by weight, count, or measure. Art. 2434. As soon as the contract of sale is completed by a delivery, the thing is at the risk of the buyer. Art. 2442. Therefore the rule of *res perit domino suo*, has become a well established principle in the contract of sale.

The compilers of the Code, after having settled the principles we have stated, proceed to point out the mode of making a delivery ; and article 2452 says, that " it is the transferring of the thing sold into the power and possession of the buyer." The Civilians all consider, that it is essential that the thing shall be under the control, and in the power of the purchaser. If the effects be moveable, the thing passes by actually giving it into the care of the buyer. If the thing sold be in a building where it is kept, there must be a delivery of the key ; but if the thing cannot be transported at the time of sale, the consent of the parties will be sufficient. Art. 2453.

In the case before us, there was not a sale *en bloc*. The cotton was never weighed, either before or after it was pressed. The key of the buildings in which the *unginned* cotton was, never was delivered to Texada. It is not shown that the cotton could not be transported elsewhere ; and, in fact, we see none of the leading requisites of a good delivery established. The fact of putting the initials of the plaintiffs on the bales, is one mark of ownership ; and if the sale had been at so much per bale, instead of per pound, it would, in our opinion, have been good ; and had the bales been weighed, before or after being hauled to

the landing, the delivery would have been complete, and the sheriff would not have had a right to seize.

The counsel for the plaintiffs rely much on the case of *Shuff* v. *Morgan et. al.*, (9 Martin 592,) to show that the delivery has been sufficient. An examination of that case shows, that it was different from this. Matthews the debtor, sold Shuff a flat boat, and 20,000 hoop poles, which were in it. The boat and poles were put into the possession of Shuff, and he had a part of the price. His laborers were employed on the boat for several days, counting the poles and landing them from the boat, when the attachment was levied. Under these circumstances, the cout held the sale good, and dismissed the seizure. There are some striking points of difference, between that case and the present. There the thing was under the control, or in the power of the purchaser; but not so with the plaintiffs. Gray had the keys of the houses, if there were any; he had the possession of the buildings, and could enter at his pleasure. He was bound to gin and pack the cotton in bales, which, in some measure, made the delivery a suspensive condition. The sale was not of cotton with the seed in it, but of cotton with the seed out, and ready for market; it must, therefore, necessarily have remained under the control of the vendor, and that being so, the delivery was not good.

It appears to us, that this case approaches that of *The Planters Bank of Mississippi* v. *Crane*, (2 Robinson, 490,) nearer than any other; and as we do not feel disposed to depart from what seems to be the clear letter of the law, for the purpose of seeking its spirit, we are compelled to decide, that the court below was in error, in maintaining the injunction for the proceeds of the twenty-five bales of cotton, and so far the judgment must be reversed.

The counsel for the plaintiffs strenuously contend that as there had been a sale of the property, the sheriff could not seize it, although the sale were fraudulent, but that an action must be brought to annul it; and he cites various decisions of this court, in which it has been decided, that where real property has been apparently legally conveyed, by an authentic act, or by one under private signature, duly recorded, a seizure could not be made, but an ac-

tion must be brought to set aside the sale; but the counsel have not produced, and they probably never will be able to produce a decision, in which this court has said, or will say, that a parol agreement to sell personal property, protects it from seizure where there has been a legal delivery. It is, therefore, ordered and decreed, that the judgment of the district court be reversed, so far as it maintains the injunction against the defendants for the sum of $697 72, the proceeds of the twenty-five bales of cotton seized by the sheriff, and the injunction is for that sum dissolved; and the said judgment is, in other respects affirmed, the plaintiffs paying the costs in both courts, and one per cent damages on the amount of the proceeds of the sale of the said twenty-five bales of cotton.

JOHN COMPTON and others, Heirs of Leonard B. Compton, deceased, *v.* AARON PRESCOTT and another, Executors of said Leonard B. Compton, and others.

Article 1474 of the Civil Code, which declares, that where the father disposes in favor of his natural children, of the portion, which the law permits him so to dispose of, he shall dispose of the rest of his property, in favor of his legitimate relations, unless he bequeath it to some public institution, does not constitute his legitimate relations, his forced heirs for the rest of his estate; nor does it render void the disposition in favor of his natural children, though he make no disposition of the residue of his estate, or subsequently dispose of it, in favor of persons not his legitimate relations; such subsequent dispositions are absolutely null, and the remainder, will go to his legal heirs. If he make any disposition of such remainder, it must be in favor of some public institution, or of his legitimate relations, but, where there are no forced heirs, he may bequeath it to such of them, one or more, as he may select.

A testator, without children or descendants, after several particular legacies, one of which was a legacy, under an universal title, of one-fourth of his whole property to his natural children, bequeathed all the remainder of the estate, which he then owned or might afterwards acquire, both real and personal, to four nieces, to be equally divided between them. The particular legacies, except one of a sum of money to another niece, either failed from the incapacity of the legatees, or were reduced. *Held*, that by leaving the remainder of his estate to be divided between his four nieces, the testator intended to give them only what might remain, after the payment of the previous particular legacies; that they are not universal legatees (C. C., 1599,) but legatees under a universal title (C. C., 1604);

that not being bound by the will to discharge any of the particular legacies, they cannot benefit by their failure or reduction (C. C., 1697); and that the legacies which have failed, or the amounts by which they have been reduced, must be considered as portions of the estate remaining undisposed of, devolving under article 1702, upon the legal heirs.

Art. 1478 of the Civil Code, which, after declaring that every disposition in favor of a person incapable of receiving shall be null, though made under the name of persons interposed, provides that the children of the incapable person shall be reputed persons interposed, does not contemplate the case where the children of such incapable person, are also the legitimate or duly acknowledged natural children of the donor or testator; in such a case if there be any interposition, it must be proved.

Illegitimate children of color, not the offspring of an incestuous or adulterous connection may prove their acknowledgment, by a white father, where such acknowledgment has been made by the latter, in a declaration before a notary public, in presence of two witnesses, not in the registry of the birth or baptism of such child; but no other proof of acknowledgment is admissible in favor of colored children, claiming descent from a white father. C. C., 221, 222, 226.

Where the deceased, has left no legitimate children or descendants, but a legitimate brother and sister, and descendants from other legitimate brothers, his natural children can receive from him, by donation *inter vivos*, or *mortis causa*, not more than one fourth in value of his property. C. C., 1473.

Fidei commissa are prohibited by law. C. C., 1507.

APPEAL from the Court of Probates of Rapides, *Waters*, J.

SIMON, J. The collateral heirs of Leonard B. Compton, who died without leaving any ascendants or legitimate descendants, represented in their petition, that the whole estate of the deceased ought to be divided into four equal portions; one of them to be inherited by his brother John Compton; another to go to his sister, Eleanor W. Compton; a third to be divided between the children and heirs of Philip B. Compton, another brother deceased; and the fourth to be inherited by, and divided between the five legitimate children of Samuel Compton, deceased, also a brother of the deceased, two of whom, in consequence of their having an adverse interest as universal or residuary legatees, under the will of the deceased, are not plaintiffs in this action, but have been made defendants, together with the testamentary executors, and all the legatees named and instituted in the said will.

They allege, that the said L. B. Compton left at his death, a certain instrument in writing, purporting to be his last will and testament, in which A. Prescott and Peter B. Compton are named

testamentary executors. That said instrument has been admitted to probate, and ordered to be executed as the olographic will of the deceased, in certain *ex parte* proceedings, not binding on the petitioners, and which ought to be annulled, and set aside. They further state, that said instrument ought not to have been admitted to probate, as the same is not valid in law, with respect to form; but that, if found to be in valid form, all the dispositions and bequests therein contained, are null and void, and ought to be set aside in favor of the legitimate heirs of the deceased.

They further aver, that the dispositions and legacies contained in the *second item* of the said will, ought to be annulled, because the legatees, Scipio and Loretta, therein named, are persons interposed, and are not the persons, for whose real use and benefit the legacies are made; that said legatees, are the children of a colored woman named Fanchon, who lived in open concubinage with the testator, for many years, down to the time of his death; and that the said Fanchon is incapable of receiving any donation from the deceased, *mortis causa*, of immoveables and slaves. That said Fanchon, is a slave, and, on that account, is incapable of receiving any donation whatever; and that if Scipio and Loretta, are not considered as persons interposed, they are legally incapable of receiving any legacy, because they are the bastard colored children of the deceased, who was a white man, and because no legal marriage could have ever been contracted between Fanchon and the testator, by whom said children could not be, and have never been acknowledged.

They further represent, that the disposition contained in the *fifth item*, by which a legacy of $20,000 is made to Aaron Prescott, is void in law, because the bequest was not intended by the testator for the use of the legatee, but was made for the benefit of Fanchon, or her two children, to whom said Prescott is charged, by secret instructions, to pay over the same; because said bequest is a substitution, and as such, is reprobated by law; and because said legatee, is not a legitimate relation of the testator.

They further state that, should it be established that Scipio and Loretta are the duly acknowledged natural children of the deceased, they are incapable of receiving from him, by donation, *mortis causa*, more than one-fourth of his estate, and that the whole of

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the rest must go to *his legitimate relations, and heirs at law*, and that the legacy should be reduced accordingly. That the disposition, contained in the *third item*, is void, because, Fanchon, a woman of color, in whose favor it is made, is not a legitimate relation of the deceased. And, that the whole of the said testament, is void, because, by law, a testator, who bequeaths any portion of his estate, to natural children, is bound to bequeath the balance thereof, to his legitimate relations. They, therefore, pray that all the legatees, and testamentary executors named in the will, be made parties defendant in this suit; that said will, be annulled and set aside; that the estate be delivered over to the petitioners; or that, if any portion of said will is held valid, then so much of its dispositions, as may be illegal and void, be set aside, and judgment rendered accordingly.

The plaintiffs subsequently filed an amended petition, in which they attack certain sales, and other acts of the deceased made during his lifetime, as being disguised donations by him made to Fanchon, Scipio and Loretta, and pray, that the same, be annulled, and the property brought back to the succession; in the mean time propounding interrogatories to Peter B. Compton and A. Prescott, for the purpose of establishing the truth of the allegations therein contained.

All the defendants but one, answer together, by first admitting, that the plaintiffs are the relations of the deceased, as set forth in the petition, but no further. They aver, that with regard to the legacy made to A. Prescott, the same is good and valid in law. That with respect to the legacy made to Priscilla Young, the same is also good, and ought to be maintained. As to the legacies made to Fanchon, Scipio and Loretta, they deny that the last will of the deceased is void, on any ground whatsoever, and maintain, that its dispositions, in their favor, are legal, and only subject to reduction, in case it should be found that the bequests, exceed the disposable portion. And, with regard to Amelia, Sarah Jane and Mary Celeste Compton, they all say, that by the disposition contained in the will, they are fully entitled to the whole of the estate of the deceased, *after payment of all the other legacies;* that the plaintiffs have really no interest therein, for, should it be decided, that the several bequests, made to the

particular legatees, must be reduced, or even declared null and void, then, and in such case, the respondents under the provisions of the will, would be entitled to all the benefits of the reductions. They pray accordingly.

Eleanor Compton, the fourth residuary legatee, filed a separate answer, in which she pleads, in substance, the same matters contained in her co-legatees' answer; maintains that, together with them, she is entitled to the whole of the testator's estate; that the plaintiffs have no interest therein, and prays that the will of the deceased be declared good and valid, and its dispositions carried into execution, &c.

The clauses of the testator's will which have given rise to the present controversy, consist in the following: 1. In the *item* second, he says, "*I do give and bequeath to my two children, Scipio and Loretta, who have been duly acknowledged by me*, my plantation on bayou Robert, on which I, at present, reside; with all the improvements, containing about 545 acres; all the slaves on said plantation, (whom he names); and it is my will and desire that the said plantation and property be kept as it now stands, &c.; and I do further give and bequeath to each of my said children the sum of ten thousand dollars, *it being my intention to give them, and that they shall have one-fourth in value of my estate, &c.*

2d. In the third *item*, he says: "*I give and bequeath to the free woman of color Fanchon, all my household* and kitchen furniture of all descriptions whatever; also one saddle horse, and my carriage, pair of horses, two patent gold watches, stock of cattle, &c."

3d. In the fourth *item*, he says: "*I do give and bequeath to my niece, Priscilla S. Young*, now the wife of Richard Young, *the sum of six thousand dollars*, to be paid out of the money due, or to become due, by my brother John Compton, &c."

4th. In the fifth *item, he gives and bequeathes to his friend and neighbor, Aaron Prescott, the sum of* $20,000; to be paid out of the first money that may become due the estate, after payment of the debts, &c."

5th. In the sixth *item*, he says: "*I do hereby give and bequeath all the remainder of my estate that I now own, or may*

hereafter acquire, both real and personal, to Amelia French, formerly Amelia Compton, and now the wife of Dr. French, of this parish, and Mary Celeste Compton, both daughters of my brother John Compton, and Eleanor Compton, and Sarah Jane Compton, daughters of my brother Samuel Compton, deceased, to be equally divided between them, that is to say: one-fourth *to Amelia*, one-fourth *to Mary Celeste*, one-fourth *to Eleanor, and* one-fourth *to Sarah Jane.*"

By the two last *items*, he appoints Aaron Prescott tutor to the two children, Scipio and Loretta, giving him his instructions accordingly; orders that the latter be furnished with funds sufficient for their support and education, &c., and appoints his nephew Peter B. Compton, and the said A. Prescott, his testamentary executors, &c.

This case was thoroughly investigated in the inferior court, under the various pleadings above set forth; but the Judge, *a quo*, after having heard all the evidence adduced by all the parties in support of their respective pretensions, conceiving that the plaintiffs had shown no real interest in the succession of the deceased, nor in his last will, which he found to be in due form of law, as an olographic testament, dismissed the present action, and gave judgment against said plaintiffs, who took this appeal.

In point of form, the will attacked in this case, is valid. It is made in the form of an olographic testament, proved to have been wholly written, dated, and signed, in the handwriting of the testator. No further objection was made to its validity in this respect in the lower court, and none was urged before us on the argument of this cause.

Several questions are involved in this controversy, in relation to the dispositions of the will, and the alleged incapacity of the legatees to receive under it. But we are stopped at the threshold by another question, also of some importance, and upon which the judgment appealed from was based, resulting from the defendants' allegations in their answers, that the plaintiffs have shown no real or sufficient interest in this action; since, should it be decided that the several bequests made to the particular legatees ought to be declared null and void, or at least reduced, as prayed for in the plaintiffs' petition, the four residuary

legatees would be entitled to take and include the amount of the legacies, if annulled, or the difference resulting from the reductions, in the remainder of the testator's estate. Hence it has been strenuously contended before us, that the plaintiffs had no right to institute this action.

1st. Because, according to the true meaning of the provisions contained in art. 1474 of our Code, the testator could validly dispose of the rest of his estate in favor of the four residuary legatees, who are his legitimate relations, without being bound to dispose of it in favor of all and every one of his legitimate relations; and that the object of the law is sufficiently fulfilled whenever the balance of the succession, after satisfying the legacy made to the testator's natural children, is bequeathed to any one, or more, of his legitimate relations.

2d. Because, under our laws, the four residuary legatees named in the will, being universal legatees, are entitled to benefit by the failure of those particular legacies which are to come out of the estate; and because the consequence of such failure only goes to increase the remainder of said estate, without devolving upon the legitimate heirs the right to claim the legacies; and that, therefore, the plaintiffs have really no interest in attacking the dispositions by them complained of.

I. This was one of the questions lately submitted to our solution in the case of *Prevost et al.* v. *Martel et al.*, decided in the Eastern District. (10 Rob. 512.) We then held, that the provisions of art. 1474, that, "*In all cases in which the father disposes in favor of his natural children, of the portion permitted him by law to dispose of, he is bound to dispose of the rest of his property in favor of his legitimate relations; that every other disposition shall be null, except those which he may make in favor of some public institution,*" cannot be understood or construed as making all the legitimate relations of a testator *his forced heirs* for the three-fourths of his estate; that said article does not prevent such testator from disposing of the rest of his property in favor of such of his legitimate relations as he may think proper to select; and that, without his being obliged to dispose in favor of all and every one of his said legitimate relations, his giving the balance of his estate to one or more of

them in the proportion fixed by art. 1473, after satisfying the legacy by him made to his natural children, is a sufficient compliance with the requisites of the law. Indeed, art. 1474 does not appear to have been intended to reserve to the collateral heirs of the testator the exclusive right of inheriting, as his heirs, the proportion which he cannot give to his natural children. The word "*heirs*" is not used in the law; it speaks only of *his legitimate relations*, among whom he is undoubtedly at liberty to select those to whom the law compels him to give the rest of his estate; and provided he does not dispose of it in favor of any one who is not his legitimate relation, except, however, in favor of some public institution, we cannot see any valid reason why full force should not be given to the disposition made in favor of the legitimate relation whom the testator has selected, although he should not be one of his direct heirs, and though it should have the effect of excluding his other legitimate relations who are not his forced heirs. Art. 1473 indicates the proportion of his property which a testator may dispose of in favor of his natural children. Such proportion depends upon the degrees of relationship of those who may pretend to claim his estate; and it seems to us, that their right to claim the inheritance, as *heirs of the deceased*, can only be exercised (unless they be his forced heirs.) in the absence of any disposition by which the rest of the testator's property would be given to one or more of his legitimate relations. Here, the deceased has given the remainder of his estate to four of his nieces, after having made a legacy to another niece. They are all his legitimate relations, and we feel no hesitation in saying, that so far as the dispositions made in their favor extend, the plaintiffs have no right to disturb them.

II. The question here presented is very different from the one which we had under our consideration in the case of *Prevost* v. *Martel*, above referred to. In that case the disposition was an absolute, general, and universal one of the whole of the succession property, "*de la généralité des biens.*" No part of the estate could be considered as remaining undisposed of, under art. 1702, which says: "*Except in the cases prescribed in the two preceding articles, every portion of the succession remaining undisposed of, either because the testator has not bequeath-*

ed it, either to a legatee, or to an instituted heir, or because the heir or the legatee has not been able, or has not been willing to accept it, shall devolve upon the legitimate heirs." And, as an universal legatee, being seized of right, by the death of the testator, of the effects of the succession, without being bound to demand the delivery thereof, (art. 1602,) is bound to discharge all the legacies, even when he concurs with a forced heir, (art. 1603,) we come to the conclusion, under the authorities therein quoted, that such universal legatee was entitled to benefit from the failure, or reduction of the other legacies; and that in case of such failure or reduction, he had a right to consider the amount of such failure, or reduction, as a part of the estate, the whole of which had been bequeathed to him by the testator's will.

But here the disposition is a limited one. The testator gives to his four nieces "*all the remainder of his estate*, both real and personal, to be equally divided between them, that is to say: one-fourth to Amelia, one-fourth to Mary Celeste, one-fourth to Eleanor, and one-fourth to Sarah Jane." And the question occurs: can they look beyond the remainder of the estate, after taking out of it all the previous legacies; and can they claim, beyond said remainder, whatever amount, or property, would remain undisposed of from the failure or reduction of the said previous legacies?

It appears to us pretty clear, that the testator never intended to give to his four nieces any part of the property, or money, which he had already bequeathed to others. When he wrote the sixth *item* of his will, he had already disposed of certain portions of his estate, which he wished to be delivered to the legatees, and in leaving the remainder to be divided and distributed between his four nieces, he necessarily referred to his estate, such as it would be after the payment or delivery of all the previous legacies. He understood that his intentions would be carried into effect; that no legacy would fail or be reduced; and that the balance, and no more, should go to his residuary legatees. If any one of the legacies is to fail, or to be reduced, this is independent of the will of the testator, and cannot be viewed but as the mere result of the illegality of his dispositions; and if so, such failure and reduction, which were not included

in the remainder of the estate, ought not to enure to the benefit of the residuary legatees, to whom they were not bequeathed, but should be considered as portions of the estate remaining undisposed of; and under the terms of art. 1702, should devolve upon the legitimate heirs. Denizart, in his Collection de Jurisprudence, *verbo* Accroissement, § 22, and 23, says: "*En général, les legs particuliers caducs appartiennent au légataire universel, à titre d'accroissement et non à l'héritier. Mais il y a des cas où les legs particuliers caducs appartiennent à l'héritier, et non au légataire universel; par exemple, si le testateur, après avoir fait des dispositions particuliéres, disoit: Et quant au surplus de mes biens, je les laisse à . . . . que j'institue mon légataire universel; alors le légataire ne pourroit avoir que ce surplus, parceque la lettre du testament résiste à l'accroissement.*" In this case the expressions or terms of the disposition seem to be adverse to the right contended for by the residuary legatees, and this, perhaps, would be sufficient to defeat it.

But in a strictly legal point of view, the residuary legatees cannot claim the benefit of the lapsing or reduction of the previous legacies; they are mere legatees *under an universal title*, and not *universal legatees*. Our Code, art. 1599, defines an universal legacy to be: "*a testamentary disposition, by which the testator gives to one, or several persons, the whole of the property which he leaves at his decease.*" This is not the case here, since, after giving one-fourth of his estate to his natural children, and making other particular legacies, the testator leaves the remainder, (of the three-fourths,) to his four nieces. Art. 1604 says, "*The legacy under an universal title, is that by which a testator bequeaths a certain proportion of the effects of which the law permits him to dispose, as a half, a third, or all his immoveables, or all his moveables, or a fixed proportion of all his immoveables or of all his moveables.*" In the case at issue, the law commanded the testator to dispose of three-fourths of his estate in favor of his legitimate relations, after permitting him to give one-fourth thereof to his natural children; thus, the legitimate relations could not get more than a certain proportion of his property, to wit, three-fourths; and this proportion was not even given, *in toto*, to the residuary legatees, since a particular legacy

of $6000, was bequeathed to another niece of the testator, who, by his sixth disposition, went no further than giving to the residuary legatees a proportion of his estate which could never go beyond the three-fourths thereof, and which was limited to what would remain after satisfying all the previous dispositions. Toullier, vol. 5, Nos. 505, 506, 509. "*C'est donc le droit originaire.*" says Toullier, No. 506, "*ou même éventuel à l'universalité des biens du testateur, qui forme le veritable caractère du legs universel.*" Here, such right to the whole succession does not exist; one-fourth is to go to the natural children by a first and previous disposition. The residuary legatees are not seised, of right, of all the effects of the succession; they are bound to demand the delivery of their portion from the heirs, (art. 1605,) or from the executors, since it consists in the remainder of the three-fourths. *Le légataire universel est seul dispensé de démander la déliverance, lorsqu' il n 'y a pas d' héritier à réserve.* Dalloz, Juris. du 19me Siècle, *verbo*, Dispos. Entre Vifs et Testam. Chap. 7, sec. 2, art. 1. They are not bound by the will to discharge any particular legacies; (art. 1697;) they are to take what may remain; the execution of the will is devolved upon the testamentary executors therein named; and, under such circumstances, we do not feel authorized to decide that the residuary legatees in this case, should be considered as universal ones.

We are aware that there may be cases in which the legatee of the residue, or of the remainder of an estate, may claim as universal legatee; and that, notwithstanding the opinion expressed by Denizart, several French commentators of great weight and authority, such as Toullier, Pothier, Merlin, Duranton, Favard and others, entertain the opinion that if a testator, after making *a particular legacy*, gives the surplus, or the remainder of his estate to another legatee, the latter should be considered as an universal one; and this is the purport of a decision reported by Ricard, in which the question was decided in favor of the residuary legatees. See Nouveau Recueil de Denizart, *verbo*, Accroissement, § 4, No. 2. Merlin Repert. *verbo*, Légataire, § 2. p. 177. Toullier, vol. 5, No. 513. But be that as it may, they all agree, that if the legacy of the surplus is preceded by one *under an universal title*, they are both of the same dignity, from the very ob-

vious reason that the succession is divided, that neither of the legatees is entitled to the whole, and that the surplus, in such case, cannot include the fixed portion of the estate already disposed of. Toullier, vol. 5, No. 512, says: "*Mais si le testateur commençait par faire un legs à titre universel, et donnait ensuite le restant de tous ses biens à un autre légataire, ce ne serait qu'un legs à titre universel, et non pas un legs universel. Si le premier legs devenait caduc, s' il était répudié, les biens accroitraient à l' héritier du sang, et non pas au second légataire, à qui le testateur n' a donné aucun droit sur la portion premièrement léguée.*" See also Dalloz, *loco citato*, art. 1, § 5. Duranton, vol. 9, No. 186. Delvincourt, vol. 2, § 345. Here again, the testator has given to the residuary legatees no right upon the portion (one-fourth) already bequeathed to his natural children; that fourth is a distinct and fixed proportion of the succession, making the disposition one *under an universal title*; and we feel bound to conclude that, if it be true that, from the illegality of the previous dispositions, any one of them should fail or be reduced, they should enure to the benefit of the heirs and not to that of the residuary legatees; and that, therefore, the Judge, *a quo*, erred in dismissing the plaintiffs' action.

We now come to the merits of the controversy; and before examining the objections which are made by the appellants to the various dispositions contained in the will, it behoves us to recapitulate the principal facts established by the evidence.

The record shows, that the testator died in the beginning of the year 1841, leaving no ascendants, or legitimate descendants. His olographic will, dated 1st March, 1840, was opened and proved on the 9th of February, 1841, and the inventory of his estate, amounting in the aggregate to $184,640, was made on the 13th of the same month; his debts not amounting to more than $4000. There were also ninety-one bales of cotton made on his plantation in the year of his death. The testimony establishes that the deceased was living in open and notorious concubinage with a mulatress named Fanchon, who, being formerly a slave, was emancipated in April, 1825; since then, she was always considered as a free woman of color. Fanchon had several children, two of whom, Scipio and Loretta, are named in the

will as being the testator's children; he always treated them as such, and acknowledged them as his natural children, by regular notarial acts executed on the 14th of May, 1830, and 27th of December, 1837. The deceased caused one of them to be educated in Ohio at his own expense, and always showed them the affection of a father. It appears that Loretta is dead.

It is admitted in the record that Mrs. P. S. Young, and the four residuary legatees are the legitimate nieces of the testator; and it appears from the pleadings, that two of them, Eleanor Compton and Sarah Jane Compton, are entitled to inherit from the deceased together with the plaintiffs, as his collateral heirs.

The record further proves, that the legacy made to Aaron Prescott was intended as a *fidei-commissum*, the amount thereof, according to the instructions of the testator, in a letter to Prescott, dated 5th of March, 1840, *to be divided equally between Scipio and Loretta.* And it is further established, that a certain tract of land situated on Red River, apparently sold by the deceased to Kelso, on the 25th of April, 1838, was re-sold by the latter to Fanchon on the 27th of the same month; and the testimony proves that said sale was a mere disguised donation. That on the 2d of January, 1840, a donation of a tract of land below Alexandria, was made by B. C. Martin and wife to Scipio and Loretta, and the circumstances disclosed that the same was intended as a disguised donation from the deceased to his natural children. That on the 15th of June, 1840, a similar donation was made of a tract of 99 acres, by P. B. Compton to Scipio and Loretta, at the instance of the deceased, who paid for the tract; and that on the 17th of May, 1830, an act of direct donation was executed by the deceased to Elizabeth* and Loretta, of a tract of land on bayou Robert, which land was, on the 20th of November, 1835, given by Fanchon to Scipio by notarial act of donation. It is also shown that Fanchon claims to be the owner of a note of hand, due by John Compton for $5000; but that the same was a gift made to her by the deceased.

* Another child of Fanchon's.

Now, what are the objections made by the plaintiffs to the validity of the dispositions contained in the will?

I. It has been contended that the dispositions in favor of Scipio and Loretta are illegal, upon four grounds: 1. Because they are persons interposed between the testator and Fanchon their mother, who, being the concubine of the deceased, was incapable of receiving any donation, *mortis causa*, of immoveables or slaves.

2. Because if Scipio and Loretta are not persons interposed, they cannot take under the will, as they are the bastard children of Fanchon, a person of color, begotten by a white man, who could not legally have acknowledged them.

3. Because, if it should be found that they have been legally acknowledged by the testator as his natural children, the dispositions in their favor must be reduced to *one-fourth* of the estate.

4. Because even if Scipio and Loretta have been duly acknowledged, yet the dispositions in their favor are void, as the testator was bound by law to dispose of the rest of his estate in favor of his legitimate relations.

II. That the disposition in favor of Fanchon, forming the third *item* of the will, is void, because she is not a legitimate relation of the testator.

III. That the bequest to Prescott is a nullity, as he is not a legitimate relation of the deceased, and as said bequest was secretly intended as a *fidei-commissum* for the benefit of Scipio and Loretta.

I. 1. This objection is based upon art. 1478 of our Code, which, after saying that "every disposition in favor of a person incapable of receiving shall be null, whether it be disguised under the form of an onerous contract, or be made under the name of persons interposed," provides, that "*the father and mother, the children and descendants, of the incapable person, shall be reputed persons interposed.*" It is true, Scipio and Loretta are the children of the testator's concubine, and by art. 1468, the latter could only receive a donation of moveables to one-tenth part of the whole value of the testator's estate; but the article relied on, merely intended to prevent indirect dispositions being made in

favor of incapable persons through persons interposed, but did not, and could not, contemplate the case where the children of such incapable person are also the children of the donor or testator; otherwise, it would amount to an absolute prohibition of the father's making to them, during the lifetime of the mother, any of those liberalities or donations, which the law permits in certain cases. For instance, by art. 1739 of our Code, a man can only leave to his wife, in the event of their having children, one-tenth in full property of his estate, or a fifth in usufruct; but by art. 1481, he can dispose, under certain circumstances, of one-half, two-thirds, or one-third of his estate; and if he accordingly devises one-third of his property to one of his children, over and above that child's portion, and said child is perfectly capable by himself of receiving the disposable portion, can it be said, that the disposition is void, because that child's mother is the testator's wife, who is incapable of receiving more than one-tenth part of his estate? Surely not. The child has his own capacity, which he cannot be deprived of; such capacity is given to him by law; and when a disposition is made in his favor, in the exercise of his legal capacity, it matters not that some other person may perhaps benefit from the testator's liberality; in such a case, if any interposition exist, it should be proved, as it would amount to a fraud which the law cannot presume. So here, if the legatees, Scipio and Loretta, are the duly acknowledged natural children of the testator, they have the capacity of receiving to the extent of one-fourth of the estate of their father, and they cannot be deprived of it under the pretext of their being persons interposed between him and their mother: if such be the case it should be shown. Duranton, vol. 9, No. 833, says: "*Les enfans communs ne sont pas réputés personnes interposées; la qualité d'enfant, respectivement au donateur et au donataire, est un titre suffisant pour motiver la donation; et cette donation ne pourrait être attaquée sous prétexte d'avantage indirect procuré au conjoint, lors même que celui-ci aurait, comme héritier de l'enfant, profité de la donation. Le conjoint ne devrait pas pour cela être considéré comme donataire.*" In No. 834 he says: "*Quant aux enfans naturels du conjoint donataire, et reconnus, ils sont réputés personnes interposées*;" but he speaks of

those natural children, as being the children of the reputed donee, of the incapable person, and not common to the donor and donee: "*C'est uniquement pour excepter les enfans communs.*" This doctrine is clearly correct, and is not in conflict with the decision of this court, in the case of *Jung et al.* v. *Doriocourt et al.*, (4 La. 175,) relied on by the plaintiff's counsel. In that case, the question of interposition arose between the children of the donee, in whose favor a disposition had been made by the father of their mother, who, (their said mother,) was shown to be the adulterous bastard of the testator, and the heirs of the latter; and it was held that, as their mother was incapable of inheriting, the claim of the children should be rejected, as that of persons interposed. Those children were not common to the testator and the donee; they had no legal capacity to receive from their mother's father; they stood between the incapable and the testator, with no other rights but those of mere strangers to the latter, and the provisions of art. 17, p. 212 of the old Civ. Code, (identical with art. 1478 of the present Code,) were clearly applicable.

2. Our Code, after having, in art. 200, divided illegitimate children into two classes, to wit: "those born from two persons who, at the moment when such children were conceived, might have legally contracted marriage with each other; and those who are born from persons to whose marriage there existed, at the time, some legal impediment," proceeds, in the two subsequent articles, to define who are meant by adulterous and incestuous bastards. Civ. Code, art. 201, 202. The latter can never be acknowledged; (Ib. art. 222;) and although there is a legal impediment to the marriage of a white person, with a free person of color, (art. 95,) the exception does not appear to extend to their illegitimate or natural children; for, art. 222, says only: that "such acknowledgment, shall not be made in favor of the children produced by an incestuous or adulterous connection." Now, art. 221, says, in positive terms, that "the acknowledgment of an illegitimate child, shall be made by a declaration before a notary public, in presence of two witnesses," and provides that "*No other proof of acknowledgment, shall be admitted in favor of children of color.*" This last proviso, which contains a negative

pregnant with an affirmative, undoubtedly means, that, as we said in the case of *Robinett et al.* v. *Verdun's Vendees*, (14 La. 545,) any other proof of acknowledgment should be excluded, when offered by children of color. It cannot mean any thing else; for art. 226, by which illegitimate children, who have not been legally acknowledged, are allowed to prove their paternal descent, provided they be free and white, provided also, that *free illegitimate children of color may also be allowed to prove their descent, from a father of color only;* and it is obvious, that this last restriction, was inserted in the law, because, with regard to his white father, an illegitimate child of color, is not allowed to prove that he has been acknowledged, but in the manner pointed out in art. 221, to wit: by authentic evidence, and that, therefore, he cannot resort to any other kind of proof, but when his father is a man of color. This interpretation, has already received the sanction of this court, in the case of *Jung* v. *Doriocourt*, above quoted, where it is said, that "the object of the law is, to exclude illegitimate colored children from any right in their natural father's estate, *who has not acknowledged them;*" and it does not seem to us, to conflict in the least with art. 259, relative to the alimony which natural children may claim from their natural parents. It is true, that article fixes the limit, to which such alimony should be extended, as to natural children of color; but it clearly corroborates our opinion, that illegitimate colored children are not on the same footing with adulterous or incestuous bastards, since by art. 262, the latter are not entitled to any alimony from their father, but can only claim it from their mother or her ascendants. We think therefore, that Scipio and Loretta could be acknowledged by the deceased; and as they have been legally acknowledged, and art. 1473 makes no distinction, they should be entitled to the rights allowed them by law as such.

3. This objection is well taken. It is perfectly clear that, under art. 1473, to wit: "when the natural father has not left legitimate children or descendants, the natural child or children, acknowledged by him, may receive from him by donation, *inter vivos or mortis causa*, to the amount of the following proportions, to wit: *one-fourth of his property, if he leaves* legitimate ascendants, or *legitimate brothers or sisters, or descendants*

from such brothers and sisters; &c." Scipio and Loretta cannot be allowed more than one-fourth of the testator's estate; this he has given them in express terms, by the second *item* of his will, in which he says: "*It being my intention to give them, and that they shall have one-fourth in value, of my estate, &c.;*" and if the property bequeathed to them, or given to them in any other way, amounts in value to more than said fourth, which, on a careful inspection of the record, we think it does, it should be reduced so as to limit it to the disposition of the law, and of the testator's will, and the difference should be considered as property undisposed of.

4. This objection has already been disposed of, on the first point under consideration; but it is meet for us to add, that a correct interpretation of art. 1474, is not adverse to the legacy of one-fourth having its effect, even although the testator had said nothing in his will, with regard to the rest of his property. It is clear, that the object of the law, is that, if he disposes of it, he must give it to his legitimate relations, that is to say, to all or such of them as he may select; but that in the absence of any disposition to that effect, or if he disposes of it in favor of other persons who are not his legitimate relations, it should go to his legitimate heirs in the regular order, without affecting the validity of the disposition of one-fourth, which he is permitted to make by the preceding article.

II. Art. 1468 renders persons who have lived together in open concubinage, respectively incapable of making to each other, whether *inter vivos*, or *mortis causa*, any donation of immoveables; and if they make a donation of moveables, it cannot exceed one-tenth part of the whole value of their estate. Thus, if the legacy made to Fanchon stood alone in the will, that is to say, unaccompanied by other dispositions made in favor of other persons also incapable of receiving but to a certain extent, she would undoubtedly be entitled to claim the moveables given to her, not exceeding one-tenth part of the estate of the deceased; but we have already seen that, by the terms of art. 1474, the testator having disposed in favor of his natural children, of the portion permitted him by law so to dispose of, he was bound to dispose of the rest of his property in favor of his legitimate relations, and

that every other disposition is absolutely null. The letter of this law is positive; its last disposition is prohibitive in its application; it destroys the right which the testator might have had of disposing of any other part of his succession indiscriminately; it limits his subsequent dispositions to those made in favor of his legitimate relations, or of some public institution; and it follows, therefore, that such dispositions as are prohibited should be considered as not written, and that the legacy made to the concubine cannot have any legal effect.

III. It is the same with regard to the bequest made to Prescott. His not being a legitimate relation of the testator taints the disposition made in his favor, with such nullity, as to cause it to be expunged from the testator's will. It is also illegal and void on the ground of its being a *fidei-commissum* prohibited by our law, (Civ. Code, art. 1507,) and should be rejected.

With regard to the indirect and disguised donations, and to the direct one made by the deceased to Elizabeth and Loretta, to wit, of a tract of land given to Fanchon, through a person interposed, (Kelso,) on the 27th of April, 1838; of two other tracts to Scipio and Loretta, through persons interposed, (R. C. Morton and wife, and P. B. Compton,) on the 2d of January, and 15th of June, 1840; and of another tract to Scipio, by an act of donation first made by the deceased to the said Elizabeth and Loretta, on the 17th of May, 1830, we are satisfied that they were illegally made, and that the property should be restored to the mass of the succession as belonging thereto: but, as Scipio and Loretta are entitled to receive one-fourth of their natural father's estate, they should have a right to keep their three tracts, if they think proper, at their real value or estimation at the time of the opening of the succession, on account of the portion which is allowed them by law under the testator's disposition in their favor. As to the tract transferred and indirectly donated to the concubine, and to the note of hand which she claims as belonging to her, and on which she has instituted a suit in the District Court against John Compton,* the drawer thereof, they should

* See the opinion pronounced on appeal, in the case of *Fanchon* v. *Compton*, *post*, p. 76.

be considered as a part of the property of the deceased; as, under the circumstances of the case, and her peculiar situation, she is not entitled to receive any thing.

With this view of the rights of the parties, we are of opinion that the final partition, settlement, and liquidation, of the succession of the deceased ought to be effected as follows: 1. After forming a general active mass of all the effects, property, and credits which the deceased was possessed of at the time of his death, and of the four tracts of land and note of hand by him illegally given to Fanchon and her children, and deducting therefrom the amount of his debts; all the property and sums of money bequeathed by the testator to his children, and to all the other particular legatees named in the will, as well as the four tracts and note of hand, should be separated from the mass, and the remainder in value or in property should go to the residuary legatees.

2. And after reducing the legacy made to the children, to the one-fourth of the whole estate, and taking the amount of said fourth, as also of the legacy made to Mrs. Young, out of the property, effects, credits, and money so separated from the mass, the balance should go to all the legitimate heirs of the deceased, to be divided between them according to law.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be annulled; and it is ordered and decreed, that the legacy made by Leonard B. Compton, in his last will, to his natural children, Scipio and Loretta, be reduced to the one-fourth in value of his estate; and that said children be allowed nothing beyond said fourth; that the legacy made to Fanchon, in the third *item* of the will, be annulled and set aside; that the legacy made to Mrs. P. S. Young, in the fourth *item*, be maintained and paid over to her; that the bequest made to Aaron Prescott, in the fifth *item* of the will, be also cancelled and set aside; that the different donations made by the deceased in his lifetime of four tracts of land, and of a note of hand drawn by John Compton, to his concubine Fanchon and her children, be all annulled and set aside, and the property restored to the succession, as a part of the estate of the deceased; that the disposition of the remainder of his estate, made by the testator in the sixth

item of his will, to his four nieces, Amelia, Mary Celeste, Eleanor, and Sarah Jane Compton, be understood as not including any part of the legacies which have failed or been reduced, nor any part of the property restored to the succession from the annulling of the donations above mentioned; and that, after satisfying the legacy of one-fourth of the estate made to the testator's natural children, and the particular legacy made to Mrs. Young, all the heirs at law of the deceased be entitled to take the balance, or difference, which may result from the lapsing and reduction of the said legacies, in the manner pointed out in this decision. And it is further ordered and decreed, that this case be remanded to the court, *a qua*, for the purpose of proceeding to the partition, settlement, and liquidation of the testator's estate, according to the legal principles recognized in this opinion. The costs in this court to be borne by the defendants and appellees.

Brent, *O. N. Ogden*, and *T. H. Lewis*, for the appellants.

Dunbar, *Hyams*, and *Elgee*, for the defendants. *Flint*, *Boyce*, and *Harris*, appeared on the same side, for two of the legatees.

Fanchon Morres *v.* John Compton.

Parol proof that a promissory note, payable to the order of the donor, and by him endorsed in blank, was delivered to plaintiff as a gift, is insufficient to enable her to hold it as a gratuitous donation *inter vivos*. Such a donation must be by an act before a notary, in the presence of two witnesses. C. C. 1523.

Appeal from the District Court of Rapides, *Campbell*, J.

The plaintiff sues for the amount of a promissory note, made by the defendant payable on the 1-4 of March, 1840, to the order of Leonard B. Compton, for $5000, with interest at ten per cent a year, from maturity till paid, endorsed by Leonard B. Compton, and alleged to have been transferred and delivered to the plaintiff. The defendant admitted his signature; denied the other allegations in the petition; alleged that plaintiff had no title to the note, which belongs to the succession of Leonard B. Compton, and that, as one of the heirs, he is entitled to claim

one-fourth of its amount; and prayed that his claim be recognized, and plaintiff compelled to deliver up the note. The testamentary executors of L. B. Compton intervened, claiming the note as the property of their testator.

On the trial, the signature of the maker, and the endorsement by L. B. Compton, were admitted. *Wise*, a witness for the plaintiff, stated, that the endorsement of L. B. Compton was on the note, when he first saw it, in the spring of 1840. That Compton had told him, in the spring of 1839, that he intended to give the note to plaintiff; that he saw the note in plaintiff's possession in the spring of 1840, and that, in the summer of that year, Compton told him that he had given the note to plaintiff. He understood from both parties that a donation of the note was intended. L. B. Compton died on the 5th of February, 1841, without ascendants or descendants. There was no evidence that the donation had been made by an act passed before a notary in the presence of two witnesses, as required by art. 1523, of the Civil Code. It was proved that the plaintiff was a free person of color, who had lived as a concubine with the deceased for many years, and so lived with him till his death; and that she had children by him. The Parish Judge by whom the inventory of the estate of L. B. Compton was made, stated, that the note sued on was not found among the papers of the deceased, but that while he was making the inventory it was produced by the plaintiff, who claimed it as her own. The inventory of Compton's estate, offered in evidence, showed that he left property to the amount of $184,640 35, exclusive of the note sued on. The will of L. B. Compton was also produced in evidence, from which it appeared that, after directing all his just debts to be paid, he bequeathed one-fourth in value of his estate to Scipio and Loretta, two natural children of color, by the plaintiff; making other dispositions of the remainder. The plaintiff died before the trial, and Scipio qualified as administrator of her succession, and made himself a party to the suit as such. Loretta was also dead before the judgment.

There was a judgment below in favor of the intervenors, ordering the note to be given up to them as the property of their testator. The plaintiff appealed.

Dunbar, *Hyams* and *Elgee*, for the appellant.

Brent and *O. N. Ogden*, for the defendant.

Bryce, for the intervenors.

SIMON, J. This is the action instituted by Fanchon on the note of hand alluded to in the case of *Compton and others* v. *Prescott and another*, *Executors, and others*, just decided. She seeks to recover the amount of said note, which, she alleges, is made payable to the order of Leonard B. Compton, and was by him endorsed over, transferred and delivered to her. The payment of said note is secured by mortgage on certain lands and slaves described in the act of sale annexed to her petition.

The defendant, who is one of the heirs of L. B. Compton, deceased, sets up that the plaintiff has no title to the note sued on, which, he says, belonged to the estate of the deceased, was found in his house after his death, and is fraudulently possessed by the plaintiff, who never paid any consideration therefor. He further avers, that the said note was donated by the deceased to the plaintiff, and that the donation thereof is null, as she was his concubine, and as he disposed by his will of one-fourth of his property in favor of his bastard children ; that said note is the lawful property of the heirs of the testator, to one-fourth of which the respondent is entitled, &c.

The testamentary executors of the last will of the deceased intervened for the purpose of claiming the note sued on as a part of his estate, and they pray that the same may be delivered over to their possession, &c.

Judgment was rendered below in favor of the executors, to whom the note was ordered to be delivered up, as belonging to the testator's succession ; and from said judgment, after a vain attempt to obtain a new trial, the plaintiff has appealed.

The evidence satisfies us, that the note sued on, though endorsed by the deceased, was really intended to be donated by the latter to the plaintiff, who lived with him in open and notorious concubinage. Whether such donation, if made in legal form, could have the effect of vesting the donee with an immediate title to the said note, as at the time it was transfered over to her, she was perhaps capable of receiving from the donor to the extent of its amount, is a question which we consider immaterial

to the decision of this cause. Art. 1523, of the Civil Code, says, that "*an act shall be passed before a notary public and two witnesses of every donation, inter vivos*, of immoveable property, of slaves or *incorporeal things, such as rents, credits, rights or actions, under the penalty of nullity.*" The only exception to this rule is under art. 1526, that, "*a manual gift*, that is to say, *the giving of corporeal moveable effects*, accompanied by a real delivery, is not subject to any formality." But here the intended donation was of an *incorporeal thing*, of a note of hand secured by mortgage, and comes clearly within the purport and meaning of the article above quoted, which requires a notarial act to be executed, whenever a donation of such things, or rights, is intended to be made. The evidence shows, that no consideration was paid or given by the appellant for the note sued on; she was the concubine of the deceased, who transferred it over to her as a *gift* or donation; and we must declare the gift void, as not made in the form prescribed by law. *Barrière* v. *Gladding*, 17 La. 144. The note sued on should, therefore, be considered as a part of the estate of the deceased, and as such must be delivered over to his executors.*

Judgment affirmed.

GEORGE W. COPLEY *v.* JOHN G. BERRY and another.

Where a party sues to annul a conveyance of land which he alleges was fraudulently obtained, to his prejudice as a previous purchaser from the same vendors, to the knowledge of one of the defendants who acted as agent of the other, and prays to be declared the owner of the land, and for damages, the action will not be dismissed on an exception that it is brought in a parish which was neither the residence of the defendants, nor that in which the land was situated. *Per Cu-*

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* The reasons assigned in the opinion delivered at Alexandria, for the judgment rendered in this case, are not the same as those given in this report. The alteration was made at New Orleans, by the Judge who drew up the opinion, with the concurrence of the other Judges who sat at Alexandria, to prevent a misapprehension of the real grounds of the decision. REPORTER.

riam: The action is rather a personal one, to obtain redress for a fraud, the effect of which was to deprive the plaintiff of a right previously acquired, than a real one to recover the land itself in the adverse possession of defendants; and though the annulling of the contract would confirm, as against the defendants, plaintiff's title to the land, the gist of the action is the cancelling of a contract.

Where a plaintiff recovers judgment in an action to annul a conveyance of land alleged to have been fraudulently obtained by the defendants, to his prejudice, from his vendors, defendants cannot complain that the judgment did not decide between such vendors, as their warrantors, and themselves. *Per Curiam*: If the conveyance was obtained by fraud, there was no valid assent, and no contract of sale, from which the obligations of warranty could result, ever existed; and the right of the defendants to recover back what was really paid under such a contract, may well be questioned. *Ex turpi causa non oritur actio.*

An action may be maintained against an absentee, though not personally cited, and though no property of his have been attached, where a curator, *ad hoc*, has been appointed to represent him.

The trouble and expense to which a party is subjected in establishing his title to property of which the defendant attempted fraudulently to dispossess him, form a good ground for estimating the damages he is entitled to recover.

APPEAL from the District Court of Ouachita, *Willson*, J.

Copley, plaintiff, *pro se.*

McGuire, for the defendants.

BULLARD, J. The plaintiff sues to annul a conveyance of a tract of land by A. and E. A. Ratcliff to Bury and Little, the defendants, which he alleges was procured by false and fraudulent misrepresentations and devices, to his prejudice as a previous purchaser from the same persons, to the knowledge of one of the defendants, who acted as the agent of the other, although his deed had not been recorded in the parish in which the land is situated. He asks for judgment to that effect, and to be declared owner of the land, and for damages.

The defendants pleaded to the jurisdiction of the court, on the ground, that the parish in which the suit was brought, is neither the place of their residence, nor that in which the land is situated, and that the action is essentially real and petitory. This exception was, we think, properly overruled; because the action is rather personal, and to obtain redress for a fraud alleged to have been perpetrated, the effect of which was to deprive the plaintiff of a right, previously acquired as between the parties, than a real one to recover the land itself in the adverse possession of the defendants. It is true, the annulling of the contract

on the ground of fraud, will have the effect to confirm, as against the defendants, his title to the land; but the gist of the action is the cancelling of a contract.

The defendants then pleaded to the merits. There was a verdict for the plaintiff, annulling the sale, as fraudulent, and for $400 damages, and the defendants appealed.

From the evidence in the record we have not found it difficult to conclude, that one of the defendants, acting for both, obtained the conveyance in question by false representations, with a knowledge of the previous rights of the plaintiff. It is not necessary to recapitulate the evidence, nor to go into any detail of the facts.

But the appellants contend, that the verdict is erroneous, in not deciding as between the defendants and their warrantors. We cannot regard the Ratcliffs as warrantors to the defendants. If they were induced to assent by fraud and deception, there was no valid consent, and the contract of sale, from which the obligations of warranty result, never existed; or, if so, has been avoided and annulled for want of such assent. The right of the defendants to recover back from the Ratcliffs, what was really paid on such a contract, may well be questioned under the maxim, *ex turpi causa non oritur actio;* but, at least, under the circumstances disclosed in this case, there was no warranty in a legal sense.

It is further contended that the defendant, Little, not being personally cited, was improperly ruled to answer, and that the action could only be brought against him by attaching his property. The record shows, that a curator, *ad hoc*, was appointed, and that he answered. This was regular, according to the uniform decisions of this court.

It is also urged, that the verdict is erroneous in giving damages to the amount of $400. Upon this it is enough to say, that it was a proper case for damages, and the jury was competent to fix their amount. The conduct of the defendant was evidently the result of a design to injure the plaintiff; and the trouble and expense of defending and vindicating himself, form a good ground for estimating the amount. We cannot say the damages were excessive.

Judgment affirmed.

Judith A. L. Cuny *v.* James Brown and another.

Where a married woman, under the authorization of her husband, sells a tract of land, retaining a mortgage to secure the payment of the price, and by the same act, without any pecuniary consideration personal to her, agrees to give priority to a mortgage to be executed by her vendee, in favor of a third person, to secure the payment of a sum, a part of which was a debt due to such third person by her husband, the purpose of the contract being to render the wife, in effect, a surety for the husband, his authorization will not remove the disability created by art. 2412 of the Civil Code, nor render the contract, so far as it accords a priority to the second mortgage, valid. C. C. 1784.

Any obligation contracted by a married woman, by which she subjects her property, though but to a certain extent, to be seized and sold for the benefit of a creditor of her husband, is prohibited, though her obligation be not co-extensive with that of her husband, and though she be not personally bound. C. C. 1784, 2412.

After the plea of the general issue, and the admission of evidence, without objection, going to show the real character of the transaction, it is too late to object that the petition sets up contradictory grounds of action, and prays for remedies inconsistent with each other.

Appeal from the District Court of Rapides, *King*, J.

Bullard, J. The plaintiff, who is the wife of Stephen E. Cuny, being co-proprietor with her husband's brother, P. M. Cuny, of a tract of land in the parish of Rapides, sold her share to the latter for about $35,000, and retained a mortgage to secure the payment of the price. The husband assisted her in the act. In the same act, she authorizes her vendee to mortgage the land to James Brown to secure the payment of about $48,000, alleged to be due by him, and she agrees to give a priority to such mortgage over hers, as vendor. The principal object of the present action against Brown, the second mortgagee, is to annul that mortgage so far as it operates to her prejudice, and to be relieved against the effect of her agreement to accord to Brown a preference over hers; on the ground, that a part of the debt thus secured, was due by her husband, and that the contract is null, because prohibited by law. She alleges, in her petition and supplemental petition, that the pretended sale to P. M. Cuny, and the postponement of her right of mortgage in favor of the defendant Brown, was intended, and has the effect, to bind her as surety for her said husband, to the amount of the debt due by him

to Burke, Watt & Co., which was included in the mortgage from Cuny to Brown. She further alleges, that she was not duly authorized to enter into such a contract, and that the same was, as to her, without consideration and void.

It is in proof, that the debt due by Philip M. Cuny to Burke, Watt & Co., amounted to about $42,000: that S. E. Cuny, the plaintiff's husband, owed them, at the same time, a note of about $3000, endorsed by Solibellas, and that C. I. Cuny, another brother, owed about $2600; making in the aggregate about the sum of $48,000, for which the new mortgage was given directly to Brown as the assignee of Burke, Watt & Co., and that Burke, one of the partners, was the agent of Brown in effecting the agreement. There is, therefore, no doubt on our minds from the evidence in the record, that a part of the debt secured by the mortgage to Brown was the amount due by Stephen E. Cuny, the husband. It is equally clear, that there was no consideration of a pecuniary nature, personal to the plaintiff, for the contract by which she agreed to postpone her rights to those of Brown, as the transferee of Burke, Watt & Co.

In the progress of the trial the plaintiff's counsel prayed the court to instruct the jury, that if from the evidence, they were satisfied that in the transaction between the plaintiff and Philip M. Cuny, her husband, S. E. Cuny had an interest in the matter which conflicted with hers, he was incapable in law to give his consent to her making the sale, and postponing her lien. But the court instructed the jury, on the contrary, that the plaintiff's husband could validly authorize his wife to postpone her mortgage, although he might have an interest in the matter which conflicted with hers. To this charge the plaintiff's counsel took a bill of exceptions, which brings to our notice the most important question in the cause. The verdict of the jury under that charge, was adverse to the plaintiff, and she appealed.

We think the court erred in laying down the law in such broad terms. Even admitting that every species, or degree, of interest in the husband, adverse to that of the wife, would not render his authorization to her to contract, invalid; yet it is clear that, if that interest consists in giving security to his creditor for a debt of his contracting, at the expense of the wife, and by a sacrifice

of her rights for his benefit, his authorization will not remove the disability created by art. 2412 of the Code. This principle does not rest alone upon what fell from the court in the much contested case of *Gasquet* v. *Dimitry;* it is expressly sanctioned by art. 1784 of the Code, which declares, that the incapacity of the wife to become surety for the husband's debt is not cured by the express assent of the husband. The Judge ought, in our opinion, to have instructed the jury, that if the purpose of the contract was to render the wife, in effect, surety for her husband's debt, his authorization did not render her contract valid.

The principal question, therefore, which the case presents is, whether the plaintiff did, by her contract with Philip M. Cuny, bind herself for a debt of her husband's contracting, according to a just interpretation of the article of the Code above referred to. In the case of *Gasquet* v. *Dimitry*, we came to a conclusion to which we have since adhered, and which we still regard as correct, that, although the obligation contracted by the wife may not be co-extensive with that of the debtor, her husband; although she may not be personally bound, and has only subjected her property to a certain extent to be seized and sold for the benefit of the husband's creditor, such contract is in contravention of the prohibition in the Code. This prohibition cannot be evaded by disguising the suretyship under the specious form of some other contract, which the wife might validly contract. We will endeavor to look through such disguises, and to give effect to the provisions of the law for the protection of the rights of married women. In the case now before us, the sale to Philip M. Cuny, and the mortgage to Brown, may be regarded as one transaction. In the sale, the future mortgage was contemplated and authorized. The debt to be secured by that mortgage was about $6000 more than the amount due by Philip M. Cuny to Burke, Watt & Co. If we add the sum due by the husband, and his other brother, we find about the amount of the mortgage. When the husband was first applied to, to authorize his wife to contract, he refused. The agent of Brown, one of the partners of the house of Burke, Watt & Co., threatens to sue him, and his accommodation endorser, on his note. It is true it is not shown

that this threat was communicated to Stephen E. Cuny, but we find him shortly after in possession of his note, cancelled, and he yields his assent to his wife's contracting. There is no evidence that the note had been paid, and *nemo facile præsumiter donare.* It appears evident to us, that the amount is still due to Brown, and is included in the mortgage given by P. M. Cuny, to which the wife yielded her right of prior mortgage and privilege as vendor. The power of attorney from Nicholson to Burke, to accept the mortgage, speaks only of a debt of $45,000, as due by P. M. Cuny, and the sum stated in the mortgage is $48,761, besides interest.

Here, then, we have the case of a married woman, who sells her property for $35,000, retains a mortgage to secure the payment of the price, and at the same time agrees to permit her vendee to mortgage it for a much larger amount than its estimated value, and to give such mortgage a priority over hers; and that, without any pecuniary consideration, and without any supposable motive, unless it was to relieve her husband, and his friend and endorser, from the importunity of his creditor, and to furnish, at her own risk, a more ample security for the payment of the debt thus due by her husband.

It has been argued by the counsel for the appellee, that even if we suppose the debt due by S. E. Cuny to have formed a part of the price for which the wife sold her land, and that the sum acknowledged in the deed to have been paid in hand, was, in fact, the same debt, yet nothing in law prevents the wife from paying her husband's debts, and that the counsel for the defendants are ignorant of any law of Louisiana which could either authorize her to reclaim the money, or to rescind the sale; and he refers to the case of *Gasquet* v. *Dimitry.* Upon looking again into that case, we find that the presiding Judge, who expressed the opinion of a majority of the court, says: "Perhaps she may sell her mortgage validly. But such contracts must be supposed to be made for her own benefit, or for the mutual benefit of herself and husband, by which she calculates on gain. Yet, admitting these contracts to be completely binding on her, it does not follow as a corollary, that she could give her property in payment of the debts of her husband, without being able to rescind the

the contract," &c. 9 La. 600. The other Judge, then composing a part of the majority, and who is the organ of the court on the present occasion, expressed a doubt whether a wife, who should have paid her husband's debts, would not be entitled to the *condictio indebiti*, and cited the 16th law of the 1st title of Pothier's Pandects, to show, that by the Roman law, the wife could, under the *Senatusconsultum Velleianum*, recover back property sold by her to her husband's creditors, in discharge of his debt.

The objection, that the petition sets forth contrary grounds of action, and seeks remedies inconsistent with each other, comes, we think, too late after the plea of the general issue, and the admission of evidence without objection, going to show the real character of the transaction. Nor can the defendants contest the title of the plaintiff in this suit. His own right rests upon the hypothesis, that the land was the paraphernal property of Mrs. Cuny.

Upon the whole, we conclude that the plaintiff is entitled to relief.

It is, therefore, ordered and decreed, that the judgment of the District Court, be reversed, and it is further adjudged and decreed, that so much of the contract between P. M. Cuny and James Brown and the plaintiff, as accords to the mortgage in favor of Brown a priority and preference over that of the plaintiff, Judith A. L., wife of S. E. Cuny, be rescinded and annulled; and that her prior mortgage be reinstated as if no renunciation had taken place; and that the appellees pay the costs of this appeal, and of the court below.

Thomas and *Flint*, for the appellant.

Dunbar, *Hyams* and *Elgee*, for the defendants.

Same Case.—Application for a Re-hearing.

A married woman, under the authorization of her husband, sold a tract of land, retaining a mortgage to secure the price, and agreed, without any pecuniary consideration personal to herself, to give priority to a mortgage to be executed by her vendee in favor of a third person, to secure a sum, part of which con-

sisted of a debt due to the latter from her husband. In an action by the wife to rescind so much of the contract as gives priority to the second mortgage over her own: *Held*, that as the husband could not authorize his wife to make a contract by which she bound her property for his debt, the contract must be rescinded, so far as it accords a priority to the second mortgage, though the debt due by the husband, formed but a part of the sum for which the second mortgage was executed. *Per Curiam*: The consent of the husband cannot be divided: *non constat*, that he would have assented to the gratuitous surrender of his wife's right but upon condition of securing the debt due by him, nor that the second mortgagee would have accepted the mortgage without a priority as to the whole sum.

THE counsel for the defendants prayed for a re-hearing in this case.

BULLARD, J. A re-hearing has been asked for in this case, upon the ground, that in admitting the principle adopted by the court, that the husband could not validly authorize his wife to contract, when such contract involves her as a surety for his debts, yet that as it appears that only a small part of the debt to Brown, was in fact the debt of the husband, she ought to be bound for the balance. But we are of opinion that the husband's consent cannot be divided; *non constat*, that Brown would have accepted a mortgage without such priority as to the whole of the debt, nor that Stephen E. Cuny would have consented to his wife's gratuitous surrender of her whole right in favor of his brother alone.

The re-hearing must, therefore, be refused; but it has been suggested to us that the judgment, as between Mrs. Cuny and Philip M. Cuny, is not sufficiently explicit; we therefore amend it as follows:

And it is further decreed, that Judith A. L. Cuny recover of Philip M. Cuny, the balance stated in the petition to be due upon her bond, with interest at ten per cent; and that the mortgaged premises be seized and sold to satisfy the same, with costs in both courts.

Emily Jane Miller v. Ebenezer Miller, Tutor.

An admission of the genuineness of the signatures to vouchers filed by the curator of a succession in support of his account, dispenses with any other proof of the payments claimed by him; but where such payments are made, without any order of court, the curator must show that the debts were really due by the succession, or he will not be entitled to credit for the amounts so paid.

Appeal from the Court of Probates of Concordia, *Mc Whorter*, J.

Simon, J. The plaintiff seeks to compel the defendant, who was her tutor, to render an account of the administration of her estate, and to pay her the balance which may be due on the rendition of said account.

The defendant answered by alleging that the plaintiff is the grand-daughter of Robert Miller, Sen., who died in 1822, and of Sarah Miller, who died in 1838; that of their marriage there were six children, one of whom was Mary Miller, the mother of the plaintiff, who is admitted to be her only child and heir. That defendant and James Miller were duly appointed curators of the succession of Robert Miller their father, and administered it as such. That in 1839, defendant was appointed tutor of the plaintiff. That no property whatever has come into the possession of defendant as tutor, except such as has proceeded from her interest in the successions of her grandfather, and mother. That all the property in the possession of Robert Miller, Sen., at his death, was community property, between him and his wife, who survived him, and that said community was accepted by the latter.

The defendant further proceeds to render an account of the estates of the plaintiff's ancestors, based upon a statement of the property in community between the spouses as per inventory and appraisement; of the proceeds of the probate sale of a part of said property, received by the curators; of the debts and charges upon said community, as paid by the curators; of the property inventoried and appraised as belonging to the succession of Sarah Miller deceased; and of the debts and charges upon the succession of the said Sarah. He accordingly files a detailed account of both successions. He appears to have had in his hands a sum

of $2455 belonging to the first succession, and to have paid the debts thereof, to the amount of $3802 99, leaving a balance in his favor of $1347 99; and the sum of $8999, is shown to have been the proceeds of the probate sale of the property belonging to the second succession. He deducts from said sum the balance due him by the estate of the husband, and the interest accruing thereon from 1823 to 1839, at five per cent per annum; deducts also the funeral expenses and legal expenditures, and adding to his credit a sum of $9373 34, as being the amount due him by his mother's succession, for her alimony, maintenance and support, up to the time of her death, he fixes the balance due him by his said mother's estate at the sum of $3304 48, one-fourth of which he says, is due to him by the plaintiff, and for which he prays judgment against her, and that his account so rendered be homologated and confirmed.

This account was opposed by the plaintiff as being inadmissible and incorrect, except with regard to two items; and the opponent, disputing every article in said account, as being debts paid without authority, and in the defendant's own wrong, avers, that the charge by him made for alimony is unreasonable, exorbitant and illegal, and prays, that the account be rejected as to the part of it entitled "passive mass" except the two items admitted; and she claims judgment against her tutor for the amount of her portions in her ancestors' estates, &c.

The Judge, *a quo*, after investigating the several matters in dispute between the parties under the pleadings and the evidence, and giving an elaborate opinion upon their respective rights, fixed the amount due by the defendant to the plaintiff, at the sum of $2411 91, and gave judgment in her favor for said amount; and from said judgment, the defendant has appealed.

The only evidence which the record contains in relation to the value of the successions of the plaintiff's ancestors, results from the admissions found in the defendant's account, except, however, that a statement of the sales made in 1823 at the request of the curators of Robert Miller's estate, was produced on the trial, showing that the said sales amounted to $1757; and it results from said defendants' accounts, that he considers himself bound to account to the heirs of Robert and Sarah Miller, for the

entire sum of $11,454, as having come into his hands as curator and administrator of the two successions. His curatorship of the estate of Robert Miller, Sen., is shown by the letters of appointment produced on the trial, and the defendant does not deny that the amount of $2455 was in his hands as proceeding from the sales, and other credits of the estate of the plaintiff's grandfather.

Now, it was admitted on the trial below, that the signatures to the vouchers filed in support of the defendant's account, were genuine; but such admission was no proof of the existence of the debts paid, but only of the payments which were made; and it was clearly incumbent upon the defendant to show, that the sums by him expended, were really due by the succession under his administration, as curator. Without such proof, his account as such, before the Court of Probates, could not have been homologated, unless it was shown that the payments had been previously ordered by the court; in which last case, the vouchers by him filed, would undoubtedly make *prima facie* evidence, at least, of their correctness. But here the defendant has never rendered any account as curator; the debts by him paid were not ordered to be paid by the Probate Judge, (Civ. Code, art. 1168, 1169, 1172, 1173,) and we are not ready to say that he should now, in a suit brought against him by one of the heirs for an account of his administration, be allowed the credits by him claimed, on simply proving that the signatures to the vouchers produced are genuine. The case relied on from 3 La. 523, is not adverse to this doctrine. This court says in that case: "that the order of the Judge for the payment of the debts of the succession, is to secure the rights of the creditors, if the succession should prove insolvent; but that the heirs have no cause of complaint, *if a just debt be paid.*" This is true; but it does not dispense with the proof that the debts paid were justly due; and as, without such proof, it would be impossible to decide whether such debts are just or not, it is obvious that the simple production of the vouchers, with evidence of the genuineness of the signatures, must be insufficient.

Under this view of the question, we have carefully examined the evidence adduced in support of the defendant's account, and the admissions made on the trial below, and have come to the con-

clusion, that instead of the sum of $1806 46, for which he was credited in the judgment appealed from, he is really entitled to the sum of $2962 76, which is the aggregate amount of all the sums he has shown to have paid for the two successions, including his commissions, and that the judgment complained of must be corrected accordingly.

With regard to the amount claimed for alimony, we think the Judge, *a quo*, did not err in rejecting it. From the defendant's own showing, it is established that his mother possessed an estate worth about $9000, which was in her possession whilst she lived at the defendant's. That estate was undoubtedly sufficient to support an old lady living with one of her children, who must have had the control of her property; and it would seem strange indeed, if we were to allow him to keep the whole of her estate as a compensation for those filial duties which he was bound to fulfil, particularly when he has not attempted by any legal proof, to account for the manner in which she may have disposed of her yearly revenue proceeding from her property. It is pretended that the evidence proves that she was infirm and diseased in her old age, and that it was necessary to employ physicians who attended her; but no physician's bill is produced, and if any was paid, who paid them? The evidence on this subject is very vague and unsatisfactory. The defendant's claim is based upon conjectures as to the value of his mother's wants and necessaries; and we agree with the Judge, *a quo*, that the idea is truly absurd, that an old woman, in the possession of an estate worth nine thousand dollars, should need alimony. The claim was properly rejected.

Upon the whole, fixing the amount which the defendant recognizes himself to be bound to account for, at the sum of $11,454, and deducting therefrom the amount of the credits to which he is entitled, say $2962 77, there remains a balance in favor of the succession, of $8491 24, to one-fifth of which the plaintiff has established her clear right, (there being five heirs instead of four,) and our judgment must be rendered accordingly.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be annulled; and it is ordered and decreed, that the plaintiff do recover of the defendant, the sum of sixteen hundred

and ninety-eight dollars and twenty-five cents, with legal interest per annum thereon from the date of the judgment until paid; and that said plaintiff be allowed to exercise her legal mortgage on the property of the said defendant, from the date of his appointment as her tutor, for the satisfaction of the present judgment. The costs in this court to be borne by the plaintiff and appellee; and those in the lower court to be paid by the defendant and appellant.

F. H. Farrar, for the plaintiff.

Stacy and *Sparrow*, for the appellant.

WARREN OFFUTT *v.* HONORÉ P. MORANCY.

Where a purchaser promises in a written memorandum signed by him, to pay the price "by acceptance and note," the vendor must prove a demand of such acceptance and note, to entitle him to recover in an action on the memorandum for the price in money.

APPEAL from the District Court of Carroll, *Curry*, J.

BULLARD, J. This suit was instituted on the following instrument of writing: "I have bought of Mr. W. Offutt a boy named Cyrus, for which I promise to pay him seven hundred and fifty dollars by acceptance and note. December 14th, 1834.

"H. P. MORANCY."

The answer of the defendant denies all the allegations of the petition, except such as are admitted; and he further says, that at or about the date of the instrument sued on, he made a contract with the plaintiff to purchase of him twenty slaves, for the sum of twenty thousand dollars, payable in the notes of Philip Maher, endorsed by him, (Morancy,) and, in his drafts on a mercantile firm in Natchez or New Orleans. Ten of the slaves were delivered according to the contract, and paid for in a note of Maher, and a draft on the designated firm, and the other ten were to be delivered whenever he, defendant, should call on plaintiff for them. He says he did call on plaintiff, by his agent, for the slaves, and tendered him the note of Maher, and the draft for the requisite amount, when plaintiff neglected and refused to deliver him the slaves sold to him, without any reason or cause,

whereby he suffered damage to the amount of $5000. He further says, that as to the slave Cyrus, he agreed to purchase him for the price mentioned, and he was to be paid for with the other ten slaves, in the note of Maher, and the accepted draft of the firm named. The defendant, therefore, prays for judgment in reconvention for the damages claimed; and asks, that a sufficient portion of such damages be applied to the extinguishment of the price of the slave Cyrus, and that, for the remainder, he have execution. He also says, that he has never been put in default by plaintiff as to the note and acceptance he was to give for said slave Cyrus, wherefore the plaintiff is not entitled to recover.

The execution of the instrument sued on is admitted. It is proved, that the plaintiff did contract to sell to the defendant twenty slaves for the price of $20,000, payable in the notes of Maher, and the accepted drafts on Burke, Watt & Co. Ten of the slaves were delivered at the time of the contract, in December, 1834; the other ten were to be delivered whenever defendant called for them. The contract was made in Mississippi, by parol agreement, in which state it is proved that slaves were personal property, and parol contracts relating to them legal In January, 1836, an agent of the defendant called on the plaintiff for the ten slaves; tendered him the note of Maher, and a draft on Burke, Watt & Co., for a sum more than sufficient to pay for them and the slave Cyrus. The plaintiff looked at the note and draft, said they were all right, or, at least, made no objection to them; but said, that he then did not have the slaves to deliver, and further, that he was to have until the 10th of February following to deliver them. He never has delivered the slaves, nor offered to do so. It is proved that, when this demand was made by the agent of the defendant, slaves were rising in price rapidly; that in the course of that year, such slaves as plaintiff was to deliver to defendant were sold at from $200 to $300 the pair, more than the price stipulated. That the plaintiff was a dealer or trader in slaves, and that his business was to buy and sell for a profit. The defendant is a planter, and did not contract for the slaves to sell again, but to employ them on his plantation. It is not shown that he suffered any loss by not getting the slaves; that he was embarrassed in his planting operations; that he lost any profits, or was obliged to purchase

other slaves at a higher price; nor is it shown that the plaintiff had at any time such slaves as he had engaged to deliver in his possession, and sold them at a higher price to some other person. When the agent of the defendant demanded the ten slaves of plaintiff, two or three persons were present; but one witness, it is proved, is sufficient in Mississippi to prove such a fact. The contract was made in that state, and was to be executed there, the plaintiff being a resident of the same.

The plaintiff had a judgment for seven hundred and fifty dollars, with legal interest from judicial demand, and the defendant has appealed.

The defendant contends, that he is not liable on the written instrument to pay for the slave Cyrus, until he has been legally put in delay, by a demand to execute the note or draft agreed to be given for him.

It appears to us quite clear, that the expression in the contract, "by acceptance and note," connects this transaction for the sale of Cyrus, with the contract shown to have existed for the sale and delivery of twenty slaves, and that the note or acceptance was to be of the same description. This is, indeed, expressly sworn to by a witness who testifies that Cyrus was to be taken at a reduced price, he not answering the description, and was to be paid for with the remaining ten not delivered. The action is brought for the price in money, without any allegation or proof that any demand had been previously made for the note or acceptance. If, on the day after the date of that memorandum, the plaintiff could not have maintained this action, without a previous demand, neither can he now. Nothing has since occurred, so far as the record shows, to authorize such recovery. He cannot be permitted to separate the agreement relative to Cyrus, from the entire contract relative to the sale of twenty slaves, to be paid for together and in the same manner.

This view of the case renders it unnecessary to inquire into the question of damages as claimed in reconvention. That claim is reserved to the defendant.

The judgment of the District Court is, therefore, reversed, and ours is for the defendant, as in case of nonsuit, with costs in both courts.

Stockton, *Steele*, and *Dunlap*, for the plaintiff.

Bemiss, *Stacy*, and *Sparrow*, for the appellant.

Samuel G. Fisher *v.* Nathaniel Moore.

Where an appellant urges as a ground for reversing a judgment, that the attorney by whom the case was conducted on his behalf in the court below had no authority to represent him, the allegation must be supported by affidavit, or it will not be noticed.

A declaration by the vendor in an act of sale *sous seing privé*, that the price had been paid, is not proof of payment against third persons.

Where an act of sale is attacked by a creditor of the vendor as simulated, on the ground that no price was paid, proof of payment of the price is on the party interested to maintain the sale. The creditor cannot be required to prove a negative.

Though a creditor cannot treat a conveyance of real estate by his debtor, alleged to be fraudulent, as null, and seize under a *fi. fa.* the property in the hands of his vendee; yet if the latter do not enjoin the proceedings, but permits the sheriff to seize and sell the property as still belonging to his vendor, and afterwards sues the purchaser at the sheriff's sale to annul the sale and cause himself to be declared the owner of the property, the creditor, cited in warranty, may plead by way of exception, whatever he might have urged in a direct action to annul the first sale.

Appeal from the District Court of Claiborne, *King*, J.

Morphy, J. The petitioner claims to be the owner of a house and lot in the possession of the defendant, under a purchase made from his brother, Miers Fisher, on the 20th of January, 1842. He alleges that subsequent to his purchase, David C. Pratt, Sheriff of the parish of Claiborne, by virtue of a pretended execution in favor of W. & J. Gasquet & Co., against said Miers Fisher, did, on the 2d of July, 1842, sell the said property to the defendant, who has ever since been in possession thereof, and claims to hold it under said sale. He alleges that this sale is illegal and invalid; that Gasquet & Co., the plaintiffs in execution, had no right to have the property seized and sold; but that, if they had a lien or mortgage upon it, they should have brought against him an hypothecary action, and thus afforded him an opportunity of contesting their right or claim. He prays that the sheriff's sale be declared null and void; that he be decreed to be the rightful owner of the property; and be allowed to recover from the defendant two hundred and fifty dollars, as damages for the occupation of the premises from the day of the sale. The defendant, after a general denial, avers that he bought the pro-

perty sued for, at a sheriff's sale, on the 2d July, 1842, and gave for it a twelve-months bond for eight hundred dollars, with George W. Thompson as his surety, and that it was sold as the property of Miers Fisher, to satisfy a judgment of Wm. & J. Gasquet against him. He prays that Miers Fisher, and Wm. & J. Gasquet & Co., be cited in warranty; that his bond for $800 be cancelled, and that he have judgment over, against his warrantors, for such amount as he may be decreed to pay. Miers Fisher answers, that since the institution of this suit, he has been declared a bankrupt by a decree of the District Court of the United States, for the Western District of Louisiana, and excepts to the jurisdiction of the court so far as he is concerned. W. & J. Gasquet & Co., the other warrantors, answering in their turn, say, that they deny the allegations of the petition, and will require strict proof thereof; that under a judgment obtained by them against Miers Fisher and Charles H. Veeder, they had the property in question seized and sold as belonging to the former, without any notice of any outstanding title, if there be any; that their mortgage was recorded long before plaintiff alleges to have acquired title. They aver that the sale under which he claims, is a fraudulent transaction: deny that possession of the premises was ever given to the plaintiff before the sheriff's sale, or that the consideration expressed in the deed of conveyance to plaintiff, to be cash in hand received, was ever paid, or any part thereof. They further allege collusion and fraud between the plaintiff and his brother Miers Fisher, who was then insolvent, require strict proof of the payment of the purchase money, and pray for a trial by jury. This answer which was signed by McGuire and Ray, as the attorneys of W. & J. Gasquet & Co., was filed on the 21st of October, 1843. On the 26th of the same month, another answer, containing only a general denial, appears to have been filed in the name of the same parties, and is signed by D. L. Evans, as their attorney at law. There was a judgment below, annulling the sheriff's sale to the defendant, and decreeing the property claimed to the plaintiff, together with $187 50, for rent; and judgment was further rendered against the warrantors, Gasquet & Co., in favor of the defendant, cancelling his bond of $800, and allow-

ing him $187 50, for the rent of the property. W. & J. Gasquet & Co., have appealed.

It has been urged in this court, on the part of the warrantors and appellants, that after their counsel, McGuire and Ray, had left the court, a second answer was filed by D. L. Evans, without any authority to represent them; that their case was tried without being set for trial; and that, although they had prayed for a jury, none was empannelled; that Miers Fisher, the plaintiff's brother, who was a party to the suit, and charged with collusion, was permitted to be sworn as a witness; and that a great part of the evidence in the case, consists of admissions stated by the clerk to have been made by all the parties, when they, the warrantors, were not present, either in person, or by their counsel, McGuire and Ray; and that, therefore, all the proceedings are null and void. This court has repeatedly said that an allegation that an attorney at law is not duly authorized to appear in a suit, will not be noticed, unless supported by affidavit. 9 Martin, 88. 10 Ib. 638. 4 Robinson, 23. Had the authority of the attorney, who appears to have managed the case below on the part of the warrantors, been thus disavowed, the facts alleged would have alone sufficed to induce us to remand the case, without examining it on its merits; but no affidavit of the party has been offered, even in this court, where perhaps, under the circumstances, it might have been noticed. We cannot, therefore, consider the suit as having been conducted by an attorney not authorized to appear in it by the appellants, although the facts alleged and exhibited by the record, seem to give some probability to the allegation made in this court.

On the merits, the record shows that on the 20th of January, 1842, Miers Fisher executed to his brother S. G. Fisher, a sale of the property in dispute, under private signature, for the sum of $2000, which he acknowledged to have received in cash. The plaintiff was then living in Mobile, and the deed was accepted for him by Edward R. Olcott, who signed it as his agent. It is not pretended that he had then any authority to buy real property for the plaintiff; but, on the fourth of February following, we find the latter executing to him a power of attorney, in which, in general terms, he confirms all and every acceptance of title

to real estate, situated in the parish of Claiborne, which, in his name, or for him, the said Edward R. Olcott, may have previously made. The sale was recorded in the office of the Parish Judge, on the 21st of February, 1842. Miers Fisher, who was sworn as a witness, testified that the defendant N. Moore, occupied the house he sold to his brother, as the tenant of the latter, from the time of the sale, and agreed to pay $150, per annum. No evidence whatever is to be found in the record, of the payment of the price mentioned in the sale between the plaintiff and his brother, notwithstanding the charge of fraud and collusion made against them, and the denial of any such payment having ever been made; nor is it shown, that Miers Fisher owned at the time, any other property than that conveyed to the plaintiff. It appears to us, that, under the circumstances and pleadings of this case, the plaintiff was bound to show the reality of the sale. The declaration in the act under private signature makes no proof of the payment of the price in a case like the present; and the creditor, who attacks a sale as simulated, on the ground that no price has been paid, cannot be required to prove a negative. But it is contended, on the part of the plaintiff, that a creditor cannot treat the conveyance of his debtor as null and fraudulent, and seize the property in the hands of his vendee. This is true; and had the plaintiff enjoined the proceedings under which Gasquet & Co., were proceeding to sell the property, they would have had to resort to a direct action, to annul the conveyance made by their debtor; but the plaintiff having stood by, and suffered the sheriff to sell the property as belonging to their debtor, they have, we think, the right of pleading, by way of exception, whatever they could urge in a direct action against the sale now set up by the plaintiff. As the latter, however, may have neglected to prove the reality of the sale under which he claims, from a belief that this proof could be called for only in a direct revocatory action; and as, on the other hand, the circumstances disclosed by the record, throw some doubt on the fairness of the trial below, and the authority of the counsel who undertook to conduct it on the part of the warrantors, Gasquet & Co., who are the real defendants in the suit, we think that justice requires that the case should be remanded for a new trial.

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It is, therefore, ordered that the judgment of the District Court be reversed, and that this case be remanded to be proceeded in according to law; the plaintiff and appellee, to pay the costs of this appeal.

Olcott, for the plaintiff.

McGuire and *Ray*, for the appellants.

JAMES B. WALTON and others *v.* THE PRESIDENT, DIRECTORS and COMPANY of the COMMERCIAL and RAILROAD BANK of VICKSBURG.

Where an attorney is appointed to represent absent defendants, and on the same day an answer is filed by him and the suit dismissed, the proceedings are irregular, and, on motion by plaintiff, the suit must be reinstated. *Per curiam:* As soon as an answer has been filed, the clerk must place the case on the docket, that it may be called in its turn and a day fixed for its trial (C. P. 463); and the court can order a nonsuit without the consent of the plaintiff, only where the case has been set for trial, and the plaintiff fails to appear, personally or by attorney, on the day fixed. Ib. 536.

APPEAL from the District Court of Catahoula, *Curry*, J.

MORPHY, J. The plaintiffs are appellants from a judgment of nonsuit rendered against them below, under the following circumstances, as disclosed by the record. On the 17th of January, 1843, they brought suit against the defendants, who reside out of the State, and levied an attachment on some lands belonging to them, lying in the parish of Catahoula. At the next term of the District Court, in March, 1843, the plaintiffs' attorney was absent, and the defendants were not represented by attorney, or otherwise. In the mean time, the property attached had been seized on an execution in another suit, brought by Henry Thomas, Jun., against the same defendants. Wm. M. Goodrich of New Orleans, who was interested in the seizure, in favor of Thomas, came to Catahoula during the term of the court, and finding the plaintiffs' attachment in the way of said seizure, consulted with G. Mayo, Esq., an attorney at law, in relation to the matter. On the day before the adjournment of the court, Mayo suggested to the court, that the defendants were absentees and not represented;

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that the plaintiffs had not appeared in person, nor by attorney; and that it might be proper to appoint some one to represent the defendants. The court, therefore, without any motion having been made either by the plaintiffs or defendants, asked Mayo if he would accept the appointment. The latter having accepted the appointment, immediately filed an answer, and plaintiffs not appearing by counsel, nor in person, the suit, on motion of Mayo, was dismissed. All this appears from the record to have been one continuous act, "without turning aside to other matters." The same entry, or order of court, contains the appointment of George Mayo, the mention of his answer having been filed, and the dismissal of the suit on account of the absence of the plaintiffs. At the succeeding term, the plaintiffs, who in the mean time had learned that their suit was dismissed, moved to have it reinstated, in which motion having failed, they prosecute the present appeal.

To say the least of these proceedings, they appear to us to have been irregular and contrary to law. As soon as an answer has been filed in the suit, the clerk must set down the cause on the docket of the court, in order that it be called in its turn, and a day fixed for its trial (Code of Prac. art. 463); and the only case in which the court can order a judgment of nonsuit against the consent of the plaintiff, is where, after the cause has been set down for trial, the plaintiff does not appear on the day fixed for such trial. Ib. art. 536. The court having, *ex officio*, appointed an attorney to represent the defendants at such a late day of the term, should have continued the cause in order to allow such attorney a reasonable time to correspond with them, and also to afford the plaintiffs an opportunity of seeing the answer filed, and of preparing their evidence. The nonsuit was, in our opinion, erroneously ordered, as the cause was never legally set down on the docket of the court, and could not be fixed for trial, it clearly appearing that the appointment of an attorney to represent the defendants was made, the answer filed, and the suit dismissed at the same sitting of the court.

It is, therefore, ordered, that the judgment of the District Court be reversed and set aside; the attachment reinstated, and the

cause remanded to be proceeded in according to law; the appellees to pay the costs of this appeal.

Garrett, for the appellants.

Mayo, for the defendants.

William Flower *v.* Solomon W. Downs.

Where accounts have been referred to auditors, the court may, on a motion to homologate the report, receive testimony and examine the auditors themselves, and correct any errors in the report, or order a new one, or a new examination of the accounts (C. P. 457); but it must proceed summarily. It cannot, without pronouncing on the report, submit the case to a jury. C. P. 457.

Where the names of some of the witnesses whose testimony has been taken under a commission were not mentioned in the commission, nor in the notice given to the other party to attend at the time and place fixed by the commissioner for taking the evidence, their testimony will not be admissible.

A bill of lading is evidence of a shipment as between the carrier and shipper, but not of delivery to the consignee.

Appeal from the District Court of Ouachita, *Curry*, J.

Bullard, J. This is an action to recover an alleged balance of account due to the plaintiff as the defendant's factor, for advances and supplies. The defendant, among other things, pleaded in reconvention, that he had lost largely by the plaintiff's neglect to sell a lot of his cotton until the price fell, when it was sold much below the market value of the article during the season.

The court at first sent the case before auditors or referrees, who reported a balance due to the plaintiff. Thereupon, the plaintiff moved the court to amend the report in certain particulars, and for judgment as prayed for in his original petition. The defendant then moved the court to strike out the objections filed by the plaintiff to the award, on the ground, that he had served him, the defendant, with a rule to show cause why the same report should not be homologated, and that he cannot demand both. The defendant showed cause why the award should not be homologated; and prayed, also, that it should be corrected; that so far as it is not opposed it might be homologated, and for a trial of the opposition by jury.

The court, without pronouncing upon the report, submitted the cause to a jury, whose verdict sanctioned, to a certain extent, the report already made, but found an additional sum due to the plaintiff. Judgment having been rendered upon this verdict, the defendant appealed.

The proceeding was, in our opinion, irregular. The court was bound to pronounce upon the report, and to proceed summarily. Code Prac., art. 457. It is true, the court might receive testimony, and even examine the referrees or auditors themselves; but it ought not to have submitted the case to a jury without disposing of the report. Article 458 of the Code of Practice declares, that the court is not bound to follow the opinion of the experts in their decision. It may correct any errors in the report of auditors of accounts, or may order a new report to be made, or a new examination of accounts.

With this view of the law, being of opinion that the case must be remanded for further proceedings, it is proper to examine certain bills of exceptions, taken by the appellant in the progress of the trial, in relation to the admission of evidence.

And first, the depositions of certain witnesses named in the bill of exceptions were objected to, on the ground that those witnesses were not named either in the commissions or the notice.* The court, in our opinion, erred. The party called on to cross-examine witnesses when testimony is to be taken on commission, is entitled, in our opinion, to be informed of the names of the witnesses whom his adversary proposes to examine, in order to know how to shape his questions. We so held in a recent case in the Eastern District.

It further appears that the plaintiff offered in evidence certain bills of lading of goods or supplies, alleged to have been shipped by the plaintiff to the defendant. They were admitted, and a bill of exceptions taken. We think the court erred. A bill of lading is evidence of a shipment, as between the carrier and the shipper, but not of delivery to the consignee; such delivery

* The commission was executed in New Orleans. A written notice was served on the defendant personally, at the Senate Chamber in New Orleans, to attend at the office of the commissioner on a day and hour named; but the notice did not mention the names of any witnesses.

ought to be shown by legal evidence, independently of the bill of lading.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and the verdict set aside; that the case be remanded for further proceedings according to law; and that the appellee pay the costs of the appeal.

McGuire and *Ray*, for the plaintiff.

Downs, pro se.

Mary L., *alias* Polly L. Graves *v.* Bernard Hemken and another.

Although on a prayer of *oyer* by defendant, the object of which is to obtain information to aid him in shaping his defence, plaintiff file a mutilated or imperfect copy of a will, he will not be precluded from giving in evidence, on the trial, a true and authentic copy of the instrument on which he relies as his muniment of title.

Where interogatories are propounded by defendant to a plaintiff who resides in another state, and the order to answer them fixes no period within which the answers shall be made, and it is not proved that the attorney of the absentee was served with any notice of the order or a copy of the interrogatories, they cannot, on failure of plaintiff to answer, be taken for confessed. Act 10 February, 1843.

Appeal from the District Court of Ouachita, *Curry*, J.

Downs and *Coply*, for the plaintiff.

McGuire and *Ray*, for the appellant.

Bullard, J. The plaintiff, Polly Lucy Travis, *alias* Mary L. Graves, the wife of Richard Graves, asserts title to a negro woman, named Jennie, and her children, who were seized as the property of her husband, at the suit of Hemken. She claims under the will of her father, Sherod Sims, of South Carolina, deceased. The defendants allege, that the slaves belong to the husband, and were brought into the State by him, and that he has always possessed them as his property.

The plaintiff had a verdict and judgment, and the defendant, Hemken, appealed.

The children of the plaintiff joined in this suit, but as they

have shown no right during the lifetime of their mother, they may be left out of view.

The will, which appears to have been sufficiently probated in South Carolina, and its execution ordered by the appointment of administrators, *cum testamento annexo*, the executors named in the will having declined the trust, gave to the plaintiff, under the name of Polly Lucy Graves, and her heirs born of her body, one negro girl, named Jennie, &c. The identity of the slave is sufficiently shown, and that she was brought to the State when the family moved here in 1836. They lived formerly in Mississippi.

It was objected, that there was such a variance between the copy of the will offered in evidence on the trial, and that filed on the prayer of *oyer*, that the former ought not to have been received. We agree with the plaintiff's counsel, that, although the party may have filed a mutilated or imperfect document, on the prayer of *oyer*, which is intended only to afford such information as to aid the defendant in shaping his defence, yet he is not precluded from giving in evidence, on the trial, a true and authentic copy of the instrument on which he relies as his muniment of title.

Interrogatories were propounded to the plaintiff touching her place of residence at different times, and whether she had not resided in Alabama in 1813, 1814, and 1815. It nowhere appears in the record, that the plaintiff was ordered to answer these interrogatories as required by law; and, consequently, the court erred in directing that they should be taken *pro confessis*.*

* It appears from a bill of exceptions, that the plaintiff objected to the interrogatories being taken for confessed, on the ground, that at the time they were propounded, plaintiff lived in Arkansas, and that no copy of them, or of the order of court directing her to answer, was ever served on her or her counsel. There was no period fixed by the order within which they were to be answered. The plaintiff's counsel relied on the act of 10th February, 1843, ch. 26.

Though the plaintiff and her husband were proved to have resided, with the slaves in their possession, in Mississippi, no proof was given of the laws of that state; and, consequently, there was no decision as to the effect of the possession by the husband, on the wife's right, under the laws of that state.

With respect to the damages of $200 which the jury awarded, it is shown that the woman's services are worth from six to eight dollars per week, and that the plaintiff, as well as her husband, was reduced by the seizure to great distress. The suit was begun in 1841, and the defendant appears to have had the services of the slave since that time.

Judgment affirmed.

GEORGE MAYO *v.* WILLIAM G. STROUD and others.

Courts of Probate are competent to decide on the title to real property, when the question arises, directly or collaterally, in a suit for partition. Act 27th March, 1843, ch. 71.

The undivided share of an heir in a succession may be seized and sold under execution (C. P. 647); but a creditor of an heir cannot seize and sell the right of his debtor to a part of the property inherited by him. The seizure must be of the whole of his rights in the succession, subject to the charges with which they may be burthened.

APPEAL from the Court of Probates of Caldwell, *Snow*, J.

SIMON, J. The plaintiff claims to be the owner of one undivided fifth interest in a number of slaves, which he says, is the interest which Frederic W. Stroud, one of the heirs of Sally Stroud, inherited from said Sally Stroud, his deceased mother, and which the said Frederic owned until divested of title by a sheriff's sale of the same, to said plaintiff, in the year 1843. He sets up the sheriff's sale as his title to the interest which he claims in the slaves, which were acquired by inheritance from the said Sally, by her five children and heirs, who own each an equal and undivided interest in the same; and he represents, that his interest requires that a partition of the slaves should be made in kind, or by a sale thereof. He therefore prays that the other four heirs of Sally Stroud, or their representatives, be cited to show cause, why a partition should not be made of said slaves according to law; that an inventory and appraisement be made, &c.

The defendants first pleaded as peremptory exceptions; that the property which the plaintiff claims, was acquired at sheriff's

sale by a person purchasing in the name of said plaintiff, but without any power or authority to do so; that no inventory and appraisement of the slaves were made before the institution of this suit for a partition thereof; and that the Court of Probates has no jurisdiction. They subsequently filed their separate answers to the merits, in which three of the defendants attempt to dispute the plaintiff's title, under the sheriff's sale, alleging that their co-heir never was legally divested of his title to his portion of the slaves; and they renew their plea to the jurisdiction of the court, as this case involves a direct question of title. They also set up divers matters going to destroy the validity of the sheriff's sale, which was made under a twelve months' bond, pretended to be signed by their brother Frederic, and allege fraud and bad faith on the part of the plaintiff's agent, &c. The fourth defendant consents to the partition prayed for; and says that, being in no manner concerned in the plaintiff's title, she leaves it to those who are interested, &c.

Frederic W. Stroud intervened for the purpose of resisting the plaintiff's claim under the alleged sheriff's sale, and to show that he never was legally divested of his title to his portion of the slaves. He alleges that plaintiff's title is fraudulent, as he became the purchaser for almost nothing, by a person who was not authorized to act as his mandatary or attorney in fact; that the intervenor's share of the slaves was seized under an execution issued on a twelve-months' bond purporting to have been signed by him, but which bond, if ever so signed, was done and executed while he was a minor and incapable of acting; that fraud was used to get his signature; that he was not aware of the consequences, and being young and inexperienced, he was induced through fraudulent motives to sign said bond, which he believes, is null on its face, not containing his name, and is no bond at all. He therefore prays to be quieted in his title and possession of his undivided fifth of the property, &c.

The petition of intervention was answered by the plaintiff, who denied the existence of the fraud alleged, averring that no ill practices were used, to his knowledge, to obtain the intervenor's signature to the bond; and the case having been tried on its merits, judgment was rendered below in favor of the defendants and in-

tervenor, rejecting the plaintiff's claim under the sheriff's sale; and from this judgment, said plaintiff has appealed.

The plea to the jurisdiction of the Probate Court, was properly overruled, as under an act of 1843, p. 45, s. 3, it is provided, that Courts of Probate shall be competent to decide on questions of title to real property, brought before them, either directly or collaterally, in cases of partition.

The sale, under which the plaintiff pretends to have purchased the interest of the intervenor in the slaves by him inherited and owned in common with his four co-heirs, appears to have been the result of an adjudication made to said plaintiff, by the Sheriff, of "all the right, title and interest which Frederic W. Stroud has, or may have, in and to the following negroes, &c." which he had seized by virtue of a *fi. fa.*, issued in the ordinary form, on a judgment rendered against the intervenor for the sum of $57 25, with interest and costs, and on the back of which *fi. fa.*, the clerk had written: "This execution is issued on a twelve-months' bond, and the property seized to satisfy the same is to be sold for what it will bring in cash." The adjudication was made to the plaintiff for $114 64½ in cash, which went in full satisfaction of the execution.

As to the twelve-months' bond, which was not produced, and is not in the record, its existence appears to be admitted in the pleadings, since the intervenor alleges that it was obtained from him through fraud. No proof of the fraud alleged has been adduced, nor has the intervenor attempted to establish any of the facts by him pleaded; and were we to decide this case on the evidence produced by the plaintiff in support of his alleged title under the sheriff's sale, his having shown the judgment, writ of execution, and deed of sale upon which his said title is based, would perhaps be deemed sufficient to sustain it.

But this case presents a question independent of the validity of the Sheriff's proceedings, which, suggested by the appellant's counsel in his written argument, cannot pass unnoticed, and on which, we think, the case must turn. It has been contended that the interest of an heir in a succession, being *one entire thing*, may be seized and sold under execution, but that part of an interest cannot be seized.

In the case of *Noble* v. *Nettles*, (3 Robinson, 152,) we held that, under art. 647, of the Code of Practice, the undivided share of an heir in a succession, may be seized and sold under execution. But here, the undivided portion of the intervenor to the succession of his mother, was not seized, but simply the right, title and interest of the debtor to the slaves inherited by him and his coheirs from his said mother, were seized and sold, and the title so acquired to the intervenor's undivided share in the said slaves, is the foundation of the plaintiff's demand for a partition thereof. The object of this suit, therefore, under the allegation of the petition, is not to make a division of the estate between the heirs, but only to divide the slaves, or their proceeds if sold, between a person originally a stranger to the succession, and the heirs of the deceased. Can this be done?

According to art. 867, of the Civil Code, "succession signifies *the transmission of the rights and obligations of the deceased to his heirs.*" It signifies also, *the estate, rights and charges which a person leaves at his death;* (Civ. Code, art. 868;) it not only includes *the rights and obligations of the deceased as they exist at the time of his death, but all that has accrued thereto, since the opening of the succession, and also the new charges to which it becomes subject;* (Civ. Code, art. 869;) and it signifies also, *that right by which the heir can take possession of the estate of the deceased, such as it may be.* Ib. art. 870. Under these definitions, how could a succession be subdivided between one of the heirs, and one or more persons strangers to it, so as to give to one the right of claiming a part of the heirship, and to another another part? The transmission of the rights and obligations of a deceased person to his heir, or to each of his heirs for his undivided portion, is an entire thing, which must be exercised in the manner, under the charges, and to the extent in which it is transmitted, and cannot be so divided as to entitle divers persons to claim separately distinct rights to distinct portions of the inheritance devolved upon the heir, and to demand the partition of divers parts of the property, and other effects of which the succession is composed. It seems, therefore, that a creditor of the heir, or of one of the heirs, cannot seize and sell the title and right of his debtor to a specific part of the property

by him inherited; that the seizure must be for the whole of his said rights, including those rights, as well as the charges with which they are burthened; so that, by the effect of the sale, they would be transferred to the purchaser with all the obligations of the deceased; and it is clear, that this would not be the case, if a distinct part of the property was sold without a full transmission of the rights of the heir to the whole estate.

In the case of ——— v. *Fournier*, yet unreported, we held, that a creditor of a legatee had no right to seize and sell *a part of the legacy*, and that the whole legacy should be seized and sold under the execution. So, by analogy, we may also fairly apply to this case, the jurisprudence of this court, by which it has been uniformly settled, that a debt, as between the debtor and creditor, is indivisible, without the consent of both, and that the Sheriff must seize and sell the entire debt. 6 La. 190. 8 La. 535. And as the effect of a sheriff's sale, in the case of the seizure and sale of a debtor's rights, debts, or claims, is nothing more than a mere transfer of said debtor's rights and claims under the Sheriff's deed, we are not prepared to say, that such transfer would be legal, if made for a part only of the rights and claims sold. 3 Rob. 432.

With this view of the question, we think, that the seizure and sale of the intervenor's title, right and interest to his undivided fifth portion of the slaves inherited by him from his mother, was illegal, as it was not a sale of all the rights and claims which he had to the succession of his said mother; that the intervenor's portion of the said succession could not be subdivided, so as to entitle divers persons to exercise them separately for divers parts; and that the Judge, *a quo*, did not err in considering the sale as a nullity.

But the evidence shows that the plaintiff has paid the debt for which the execution issued; that the payment by him made to the Sheriff has turned to the benefit of the intervenor; and we think it just, that his right to sue the latter for the reimbursement of the amount so paid, should be reserved to the plaintiff.

It is, therefore, ordered and decreed, that the judgment of the Probate Court be affirmed, with costs; reserving to the plaintiff

the right of claiming the reimbursement of the amount by him paid to the Sheriff for the benefit of the intervenor.

Mayo, appellant, *pro se*.

McGuire, for the defendants.

SUCCESSION OF JOHN M. TOMPKINS.—GEORGE N. PARKS, Appellant.

Where the amount in controversy cannot be ascertained from the record, the appeal must be dismissed.

APPEAL from the District Court* of Carroll, *Willson*, J.

Selby, for the appellant.

Stacy and *Sparrow*, contra.

SIMON, J. This proceeding having been instituted by a person who alleges in his petition, that "his interest requires *that a proper person should be appointed to administer the succession* of J. M. Tompkins, (which he intends to sue,) *as he is a creditor thereof*, and that the person appointed should be required to give bond and security according to law;" the Judge, *a quo*, granted an order to convene a family meeting for the purpose of appointing a tutor to the heirs (all minors) of the deceased, against whom, said tutor, the plaintiff's proceedings could be had in the exercise of his rights against the estate. A family meeting was accordingly called, and a person was recommended to be appointed tutor of the minors, when, before the homologation of the proceedings of the family meeting, the minors' mother and her second husband, both residing in the state of Mississippi, made opposition to the homologation, on divers grounds stated in their opposition, going to show the illegality of the proceedings complained of, and that the minors are already under the guardianship of their mother's second husband, who was duly appointed as such, in the place where they all reside.

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* This case was tried before the District Court of Carroll, the Probate Judge having recused himself as interested.

Judgment was rendered below, homologating the proceedings of the family meeting, and appointing the tutor therein recommended; and from this judgment, the opponent, George N. Parks, has appealed.

A written motion has been filed to dismiss this appeal, on the ground, that we cannot take cognizance of it, as the matter in dispute is not within our jurisdiction.

It is true, it is admitted in the record that the appellee claims *to be a creditor of the estate* of Tompkins, and it is stated in a memorandum signed by the counsel on both sides, that no objection is made to his proceedings upon the ground that he is not a creditor, it being also understood that no admission is made that he is a creditor. It is also admitted, that the property of the estate of Tompkins *has all been removed* to the state of Mississippi, except, that said estate has judgment and other debts due it by persons residing in this state who are solvent, and that there are persons in Carroll who have claims and demands against the estate. But nothing in the record shows the amount of the appellee's claim against Tompkins' estate, nor the value of the succession which is sought to be administered by the appointment of a tutor to the minor heirs of the deceased; and we have repeatedly held, that when, from the record, we cannot ascertain the amount of the succession, and are unable to say what is the sum in controversy, the appeal should be dismissed. 5 Mart. N. S. 185. 5 La. 36. 3 Rob. 10.

It appears, however, in this case, from the statement of facts, that the estate of Tompkins having been opened in the parish of Carroll, an inventory was made, and that all the proceedings had in the Court of Probates of said parish, were offered and received in evidence on the trial below; but those proceedings have not been brought up with the record, and it was the duty of the appellant to bring before us the necessary proof to show that he is entitled to an appeal. As the case stands, it does not appear that the present appeal is within our jurisdiction.

Appeal dismissed.

Warren M. Benton *v.* James Roberts.

Damages will not be allowed for a frivolous appeal, unless prayed for by the appellee.

Appeal from the District Court of Carroll, *Willson*, J.

Stacy, for the plaintiff.

Selby, *Bemiss* and *Willson*, for the appellant.

Simon, J. The defendant is appellant from a judgment which condemns him to pay to the plaintiff the sum of $1770 14, which is the amount claimed, (except $20,) in said plaintiff's petition, as due him upon four drafts drawn upon him by said defendant at divers times and dates, and on a note which the plaintiff drew for the benefit of said defendant, in favor of, and made payable to, Abner C. Roberts; the whole amount of which, it is pretended, was to be credited upon a note of $5000 due by the plaintiff to the defendant, and upon which judgment has been obtained and execution issued, without allowing said plaintiff any credit for the sums which he had paid, or assumed to pay, for the said defendant.

The signatures of the defendant on the drafts sued on have been satisfactorily proven, as also the fact of the plaintiff having assumed to pay for the defendant, to Abner C. Roberts, a sum of $700, for which Benton gave his own note. One of the witnesses states, that it was agreed between defendant, the plaintiff, and Abner C. Roberts, that Benton should pay to the latter for James Roberts $700 or $800, and that Benton gave Abner C. Roberts his note for $700 in full of what James owed to Abner, and that this note was to be credited on Benton's note to James. The note, on which the credit was to be given, was for $5000.

It is also admitted, that the amounts claimed by the plaintiff in this suit as due to him, have not been credited on the $5000 note due by Benton to James Roberts; that there has been judgment on the said note against Benton, and property sold; and that there has been a twelve-months' bond given in the case.

This case presents a mere question of fact, which seems to have been well investigated below. We have carefully examined the evidence adduced on the trial, and, without its being ne-

cessary to give any further detail of it, we are satisfied that the plaintiff has shown himself entitled to recover the amount sued for. He owed a note for $5000 to the defendant, who was to credit him on the same for the different sums paid, or assumed to be paid; this the defendant did not do, but obtained judgment against him for the whole amount of the note; and it appears to us just that those credits, which are now the subject of a separate action, should be the basis of a separate judgment in favor of Benton against the appellant. The proof is so positive as to the fact of its having been understood between the parties that the drafts and the note of $700 were to be credited on the $5000 note, that we are really at a loss to discover what relief the appellant expected to obtain at our hands, and had the appellee claimed damages against his adversary, as for a frivolous appeal, we should have felt ourselves bound to allow them to the whole extent of the law.

Judgment affirmed.

JOHN B. LYNCH *v.* MARTHA A. BENTON and Husband.

A wife, who has concealed or converted to her own use, without accounting therefor, or made away with any of the effects of the community of gains, cannot renounce the community. C. C. 2387. But for whatever cause she may have forfeited the right of renouncing, she can be made responsible only for one-half of the debts contracted during the marriage. C. C. 2378.

A wife may render herself personally liable for one-half of the debts of the community, by her acts, though done without any fraudulent intent; as by taking an active concern in the affairs of the succession, or by failing to make an inventory, before making her renunciation, and within the legal delays, &c.

Property of all kinds found in the possession of a person at the time of his death, is presumed to belong to his succession.

APPEAL from the District Court of Carroll, *Willson*, J.

MORPHY, J. The petitioner, a judgment creditor of the succession of David O. Barton, for $1570, seeks to render personally liable for his claim, Martha A. Bass, late widow of the deceased, and now wife of W. M. Benton. He alleges in substance that the said Martha A. Bass, at the death of said David O. Barton,

intermeddled with his estate, by taking from it certain moneys, and not accounting for the same in any manner whatsoever; that she did not inventory a great part of the property belonging to the deceased, but kept the same, and converted it to her own use; that she recovered debts due to the estate for which she never accounted, and paid claims against it without any order from the Court of Probates; that she never filed a tableau of distribution, nor in any way accounted for any of the moneys received by her belonging to the succession; that, as executrix, she never obtained any order authorizing any of the sales she made, and never attended to any of her duties in said capacity, and has lately caused herself to be discharged without rendering an account of her executorship, &c.; by means of all which acts and omissions she has made herself personally liable for the debts of the estate. The petitioner further alleges that W. M. Benton, the second husband of Martha A. Bass, has also rendered himself liable for the debts of the said David O. Barton, by participating in said acts of intermeddling and taking possession of property belonging to the estate; and a judgment, *in solido*, is asked against both of the defendants. The latter deny having ever intermeddled, or interfered with the property and effects of the late David O. Barton in any manner, shape, or form, so as to make themselves liable as wrongdoers; they aver that Martha A. Bass was appointed executrix to the estate, and qualified as such in the Probate Court of the parish of Carroll, and that all her acts and doings in relation to the said estate, were done by her in her representative capacity, in good faith, and with a view to the interest and benefit of the same, cautiously avoiding to do any act or acts that might render her personally liable in any manner whatever. The case was tried in the District Court by a jury, who brought in a verdict in favor of the plaintiff. A motion for a new trial was made, which, upon the judgment being remitted as to Warren M. Benton, was overruled, and judgment rendered accordingly against Martha A. Bass, for the full amount of the plaintiff's claim; from this judgment she appealed.

In the case of Selby against the same defendants, reported in 19 La. 499, the facts and evidence are stated at full length, in relation to all the acts and doings of the appellant after her

husband's will was found, and she had qualified as executrix. On a careful examination of that case we came to the conclusion that, as previous to the inventory she had done no act to make her liable for the debts of her husband's estate, her subsequent acts were done in her representative capacity, and could not render her liable as an intermeddler or wrongdoer, even if they were irregular or illegal. In the present case the record contains evidence, and discloses facts, which did not appear in the suit just alluded to. Lewis Selby, a witness for the plaintiff, testifies that he was at the house of Dr. Barton when he died, or perhaps a few hours afterwards, having been sent for by Mrs. Barton, and requested to assist her as counsel in settling the estate. They examined some papers together, and found none of much importance; witness picked up a roll of papers, which he found to be bank-notes from an examination of the edges; he did not see the denomination of the bills; the roll was about the size of three fingers, or perhaps smaller; if large bills, there might have been some thousands of dollars, if small, much less. He laid down the roll. The widow then took it up, and witness has never since seen or heard of it. Witness gave her some hints that she should not meddle with the estate. She answered, in substance, that she thought the money had not been properly taken care of before, that she would be the banker now, and would take care of it herself. The same witness testifies that, in the spring before the death of Dr. Barton, (which occurred in January, 1839,) he saw in his possession a number of one thousand dollar bills, probably ten or twelve; he understood from Dr. Barton, that he had collected the money for Bass' estate to which he was executor, &c. Another witness, Dr. A. C. Roberts, says, that he was with Dr. Barton a good deal through his last illness up to the night of his death. A few days before he died, he had occasion for some money; he called for a pocket-book, in presence of witness, and opened it; witness saw in it several large bills of $100, there appeared to be a large amount of paper money in the pocket-book. Witness was with Dr. Barton the greater portion of every day for some weeks before he died. At the time witness saw the money spoken of, the deceased was laboring under the dropsy, and it was hourly expected he would

die. Witness did not see him expend any money after that time. He thinks the bills he saw in Dr. Barton's possession, so shortly before his death, were Louisiana bills. From this evidence it is clear that there existed money, in the possession of Dr. Barton at the time of his death, although the precise amount of it has not been shown, and that this money was taken by his widow, Martha A. Bass, who does not appear to have accounted for it, either when she had an inventory of the estate taken by the Parish Judge, or when she rendered an account of her administration as executrix, and obtained her discharge. A few days after the inventory was made, she executed before the Parish Judge, and two witnesses, an act in which she renounced the community of gains and *acquests* which had existed between her and her late husband, and indicates a few effects of little value as having been left out of the inventory by oversight or accident, but makes no mention of any amount of money having been found by her in the possession of her deceased husband. The positive testimony of those witnesses, who declare that they saw money in the possession of Dr. Barton shortly before, and after his death, cannot be outweighed or destroyed by the declarations of some of the female acquaintances, or friends, of the defendant, that they saw no money about the house and do not believe that the widow had much in her possession, as she sometimes borrowed small sums of money for her current expenses. She might have borrowed money for the very purpose of producing the belief that she had none; or it might be that she had none but large notes then in her possession. It is true, that some of the witnesses, who were well acquainted with the affairs of the deceased, testify, that he had little money of his own, although he might have had funds belonging to the estate of Job Bass, whose executor he was. It matters not for whose account he had the money if it was found in his possession; it was his money although he may have owed the estate of Job Bass an equal, or a larger amount; money, except in case of special deposit, or under peculiar circumstances, cannot be identified.

The surviving wife, who wishes to preserve the power of renouncing the community of gains, must make a true and faithful inventory of all the property belonging to it. Civ. Code, art.

2382. If she conceal or make away with any of the effects of the partnership or community of gains, she will be declared common in property with her husband, notwithstanding her renunciation. Ib. art. 2387. This court has held, that a wife cannot renounce the community, if it be proved that she has transferred a note belonging to it for the purchase of property in her own name. *Lauderdale* v. *Gardner*, 8 Mart. 717. *Davis* v. *Gardner*, Ib. 729. These decisions are based on the provision of law which exists in the old, as well as the new Code, which deprives the widow who takes an active concern in the affairs of the community, of the right of renouncing the same; but from whatever cause she forfeits the right of renouncing the community, she can be made responsible only for one-half of the debts contracted during the marriage. Civ. Code, art. 2378. *Flood et al.* v. *Shomburgh*, 3 Mart. N. S. 631.

There are in the record two bills of exceptions taken by the defendants' counsel, one is to the charge of the Judge, as actually given on the trial; and the other is to the refusal of the Judge to charge the jury, that "the only grounds on which the plaintiff could proceed against the defendants formally in the court below, was that of fraud or concealment of the effects of the succession of D. O. Barton, deceased, with a fraudulent intent." The written charge of the Judge was, that, "there are two methods by which a widow in community of property, with her deceased husband, may accept that community: one is by some written act; the other is by taking into her possession, and converting to her own use, any of the property, without accounting for it previous to making a renunciation. All the property of all kinds found in the possession of the deceased, the law presumes to belong to the succession. All the money found in it belongs to the succession, unless it can be identified by some description so that it may be inventoried in kind. If the widow, previous to making a renunciation of the community of *acquests* and gains, take into her possession any of the property of her deceased husband, and make use of it for her own use and benefit, without accounting for the same, she looses the capacity to renounce, and becomes unconditionally liable to pay the debts. It is not necessary that the widow should have intended the commission of a fraud on

the creditors. It is a legal right which she has, to accept the succession in any manner under the conditions imposed by law; if she should prevent a just inventory being taken, with an intent to hinder, or oppose a just administration of the affairs of the succession, she will be liable; she must then have intended to commit fraud. If the widow has made herself liable, the creditors of the succession may sue her, whether the estate of the deceased be solvent or not. If the wife were administratrix or executrix at the time she took possession of the property, it will be presumed that she took possession in that capacity; and on her neglect to account for it, she must be sued on her bond. The court having decided that any moneys found in the possession of Dr. Barton, without being particularly marked, were his property, the jury, in order to make defendant liable for not inserting these moneys in the inventory, must be satisfied that they came to defendant's possession, and were by her appropriated to her own use." This charge is, in our opinion, substantially correct, and in no manner calculated to mislead the jury; and, we think, that the Judge properly refused to charge the jury, as requested by the defendants' counsel. There are cases in which the wife may render herself personally liable, without having any fraudulent intent, as for instance when she takes an active concern in the affairs of the succession, or fails to make an inventory, before making her renunciation and within the legal delays, &c.; but when her liability results from the taking and converting of the money of her husband's estate to her own use, as in the present case, the act itself implies fraud. *Res ipsa loquitur.* She should, however, have been decreed to pay only one-half of the plaintiff's demand. She is in the same situation as if she had made no renunciation. Art. 2387.

It is, therefore, ordered and decreed, that the judgment of the District Court, be reversed, and that the plaintiff recover of the defendant Martha A. Bass, wife of Warren M. Benton, seven hundred and eighty-five dollars, with legal interest thereon until paid, from the 5th of November, 1840, with costs below, those of this appeal to be borne by the plaintiff and appellee.

Willson, for the plaintiff,

Stacy and *Sparrow*, for the appellant.

OLIVER J. MORGAN *v.* MARTHA A. BENTON and Husband.

APPEAL from the District Court of Carroll, *Curry*, J.

MORPHY, J. The plaintiff claims of Martha A. Bass, late widow of David O. Barton, and now the wife of Warren M. Benton, $1197, with ten per cent per annum interest thereon, from the 1st of January, 1839, this amount of capital and interest being due on a note drawn by the said D. O. Barton, to the order of H. Practice, and by the latter endorsed over to him. The grounds upon which a recovery is sought to be made, and the evidence adduced in this case, are the same as in that of J. B. Lynch against the same defendants, just decided, *ante*, p. 113, and both cases have been tried together in this court. The jury, however, before whom this cause was laid, came to a different conclusion from that arrived at in the other, and brought in a verdict in favor of the defendants. After an ineffectual attempt to set aside this verdict, the plaintiff has appealed from the judgment entered up on it.

On an examination of the law and evidence of the case we have adopted the conclusion of the jury in the other suit, and think that the plaintiff should recover one-half of his demand.

It is, therefore, ordered, that the judgment of the District Court be reversed, and that the plaintiff recover of the defendant, Martha A. Bass, wife of W. M. Benton, five hundred and ninety-eight dollars and fifty cents, with interest at the rate of ten per cent per annum, from the 1st of January, 1839, until paid, with costs in both courts.

Willson, for the appellant.

Stacy, for the defendants.

The Union Bank of Louisiana *v.* Cesaire Fonteneau and others.

Notice, orally delivered, to an endorser of a note on the day of its maturity, but after business hours, that the note would be protested on that day unless it were paid, or some arrangement made, is insufficient to bind the endorser. An endorser can only be made liable where the note has been duly protested for non-payment, after demand and presentation at the place where it was made payable, and written notice of the non-payment and protest.

Notice of the non-payment and protest of a note, given to an endorser residing in the town in which the note was payable, two days after the protest, is insufficient.

Appeal from the District Court of Natchitoches, *King*, J.

Roysdon, *Dunbar*, *Hyams*, and *Elgee*, for the plaintiffs.

Boyce, appellant, *pro se*, cited Chitty on Bills, ed. 1834, pp. 62, 63, 64, 66. Bailey on Bills, 262 to 265. 11 Mart. 452. 12 Ibid. 177.

Tuomey, on the same side, cited *Hart* v. *Long et al.*, 1 Rob. 84; *McKee* v. *Dubois*, 5 Rob. 421.

Simon, J. This is an action on a promissory note against the maker and endorsers thereof. The endorsers plead their discharge, in consequence of the want of proper presentment, and demand of payment of the note, at the place therein indicated, and of due notice of protest.

The District Court gave judgment in favor of he plaintiffs, against the maker and the first endorser for the amount sued for, and discharged the second endorser from liability; and from this judgment, the first endorser, Michael Boyce, has appealed.

The protest of the note sued on was made on the 7th of June, 1842, and the notary states, in his certificate of notice, which is dated the ninth of the same month, "that the parties to said note have been duly notified of the protest thereof, by letters to them by me written and addressed, dated on the day of said protest, and served on them respectively in the manner following, to wit: Michael Boyce, Esq., Natchitoches, La., personally; H^re^. Bordelon, Esq., Natchitoches, La., and put into the post-office at Natchitoches in presence of the undersigned witnesses *this day*," &c.

The protest states, also, that the note was presented at the branch of the Union Bank of Louisiana, at this place, Natchitoches, where the same is made payable, and payment thereof demanded, &c.; but the evidence establishes, that on the day the protest was made, the cashier of the Union Bank was absent from the place; that before he went away, a notice was posted up on the door of the office of the Union Bank, directing persons having business there to call at the City Bank, which is under the same roof, and part of the building occupied by the cashier of the Union Bank,* and that the note sued on was presented for payment at the City Bank. Said note was not presented, or payment of it demanded, at the Union Bank, as one St. Amans was the acting cashier for both the City and Union Banks, the cashiers of both institutions being then absent.

The testimony further shows, that on the day of the protest, the notary presented the note to Michael Boyce, the first endorser, saying, that unless it was paid or arranged, it would be immediately protested, and that Boyce answered, that it would have to be protested. The note was presented to Boyce, at the request of St. Amans, because the latter had already told Boyce that a note, upon which he was endorser, would be that day protested; and Boyce had answered that he did not recollect having signed it. The note was then put into the hands of the notary, who, after having presented it for payment at the City Bank, held the above-mentioned conversation with Boyce, but it was before the protest, at about four o'clock, P. M., after business hours. The notice of protest was served upon Boyce personally, on the ninth of June, in the town of Natchitoches, where he lives.

Under this evidence, it is pretty clear, that even supposing the demand for payment to have been properly made, under the circumstances, at a place where the note sued on was not made payable, which appears to us to be very questionable, due and

* This appears to be a mistake. The testimony of Williams shows, that "the office of the Union Bank is under the same roof, and part of the building occupied by the cashier" of the Union Bank. The City Bank and Union Bank are proved to have been in different streets.—R.

sufficient notice of the dishonor of the note was not given to the endorser, Boyce. The person who acted as cashier of both the Union and City Banks at Natchitoches, and the notary who made the protest, may have been under the impression that their calling upon the endorser for the payment of the note, as for an arrangement of the matter, would amount to a notice that said note would not be paid by the drawer thereof, and would be protested; but it was not protested at the time; and there was then no occasion to bring to the knowledge of the endorser a fact which had not taken place. The law has never contemplated that a note or bill should be considered as dishonored, and that the parties thereto should become liable to pay it, unless, after being duly protested, in consequence of the want of payment on due demand and presentation, made at the place where it is made payable, notice thereof is given to the parties upon whom the holder intends to look for its payment. Boyce had nothing to do with the payment of the note at its maturity. He was a mere endorser, whose obligation depended upon a strict compliance with the law, and whose liability did not attach, until due notice of non-payment and protest; and we are unable to distinguish this case from that of *McKee* v. *Dubois*, 5 Rob. 421, which presented a similar question, and in which we said, that "the evidence of notice does not otherwise result, than from the implication drawn from the notary's demand of payment from the endorser, when he informed him that he had in vain called on the makers, while the endorser was entitled to a *written* notice of non-payment and protest." The call, in this case, was also made on Boyce before the protest; he is shown to have resided at that time in the town of Natchitoches, where the protest was made; and the notice given to him personally two days after said protest, was clearly insufficient.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed; and that ours be for the defendant and appellant, with costs in both courts.

JOHN J. GUION and another *v.* ROBERT FORD.

At the time of executing a prison-bounds bond by a debtor arrested under final process, the prison-limits were, under the statute of 25 February, 1837, co-extensive with the boundary of the parish in which he resided. A new parish was afterwards formed from that portion of the old in which the debtor resided, and from part of a contiguous parish, and the seat of justice of the new parish established at a place never within the limits of the old. In an action against the surety on the bond, it was proved that the debtor had gone to the seat of justice of the new parish: *Held*, that the statute creating the new parish cannot have rendered the condition of the debtor more onerous by compelling him to remain within the restricted limits of the old parish; that, by the creation of the new parish, the debtor was either released altogether, or became a prisoner, in the custody of his bail, within the limits of the new parish; and consequently, that the bond was not forfeited.

APPEAL from a judgment of the District Court of Madison, *Curry*, J., rendered in favor of the defendant.

Stockton and *Steele*, for the appellants.

F. H. and *T. P. Farrar*, for the defendant.

BULLARD, J. This is an action against the surety on a bond given by a debtor arrested under final process, conditioned to remain within the prison-limits. Those limits were, at the date of the bond, co-extensive with the parish of Carroll, in which the debtor resided. After the execution of the bond, the new parish of Madison was erected, composed of a part of the parish of Carroll, and particularly of that part in which the debtor resided, and embracing the spot on which the village of Richmond is situated, on the west side of the Roundaway bayou, the present seat of justice of the new parish, and which never had been within the limits of the parish of Carroll. It appears that Rusk, the principal in the bond and the judgment debtor, went to Richmond during the sitting of the District Court, and was killed. The act of going to Richmond, the seat of justice of the new parish, is assigned as a breach of the bond.

The question thus presented is novel, and no adjudicated case, having any analogy to the present, has been referred to in the argument, except that of *Olden* v. *Alexander*, 12 La. 156. In that case we held, that when the Police Jury had established the prison-bounds, and after the date of the bond, the legislature had

annexed a part of the parish to an adjoining one, the act of the legislature did not abrogate the ordinance establishing the prison-limits, and if the prisoner had a right, at the date of the bond, to go to Port Hudson, as a part of the parish of East Baton Rouge, and within the limits established by the Police Jury, he had still a right to do so without incurring a forfeiture of his bond, although the legislature had annexed it, in the meantime, to East Feliciana. One of the reasons for that decision was, that at that time the prison-limits for each parish were established by the Police Juries, and that they were not perhaps obliged to restrict the limits to those of the parish itself.

The legislature afterwards, in 1837, declared, "that the prison-bounds of all the parishes of this State shall be the limit of the parish boundary." B. & C.'s Digest, 684.

Upon the passage of the act creating the parish of Madison, the residence of Rusk fell within the prison-limits of the new parish. He became a citizen of that new parish, and was subject to militia and jury duty. Having been legislated out of the former prison-limits, his remaining at his own residence after the passage of the act, could surely not be assigned as a breach of the bond. What then was his condition? He was either released altogether, or he became a prisoner in the friendly custody of his bail, within the limits of the new parish. The act of the legislature cannot be supposed to have rendered his condition more onerous, by compelling him to remove within the restricted boundaries of the parish of Carroll. That would be substituting a new condition upon which the liability of the surety should depend. He was not then a prisoner within the new limits of the parish of Carroll, after the establishment of the parish of Madison. Whether we consider him as no longer bound to remain within the boundaries of Carroll, or bound to keep within the limits of his new parish, he had equally a right to go to Richmond, without incurring a forfeiture of his bond. The question, it is true, is not free from difficulties, but in the absence of any positive law, and in cases of doubt, it is proper to decide *in favorem solutionis.*

Judgment affirmed.

James M. Williams *v.* The Planters Bank of Mississippi and others.

The seventh section of the statute of Mississippi, of 21 February, 1840, prohibiting the banks of that State from transferring, by endorsement or otherwise, any note, bill receivable, or other evidence of debt, and the second section of the statute of 22 February, 1840, requiring that they shall, at all times receive their own notes at par in payment of any debts, due them by bill or otherwise, are constitutional, and do not impair the obligation of any contract; and where a judgment obtained by a Mississippi bank has been seized by a creditor of the bank, the debtor is still entitled to discharge it in notes of the bank, at par.

Where other sureties have been substituted, the original surety in an injunction bond may be examined as a witness for the plaintiff in injunction, though, by the statute of 25 March, 1831, § 3, it is declared that the surety on the bond shall be considered as a party to the suit, and be liable to be condemned, *in solido*, with the plaintiff, for damages and interest.

Appeal from the District Court of Concordia, *Curry*, J.

F. H. and *T. P. Farrar* and *Prentiss*, for the plaintiff.

Shaw, for the appellants.

Dunlap, for the intervenor.

Bullard, J. This suit was commenced by injunction, the plaintiff alleging that the Planters Bank of Mississippi had a judgment against him upon which he had made a large payment. That the Bank had made a fraudulent and illegal transfer of the balance due on said judgment to one Sessions, who had caused execution to issue, which had been levied on his property. That the Bank is required by the laws of Mississippi to receive its own notes in payment of all debts due to it, and is prohibited from making any assignment of its notes or other evidences of debt or claims. That its notes were at a discount, and that he tendered its own notes to the Bank, to its assignee, and to the Sheriff. He claims in compensation, the notes thus tendered, and which were deposited in Bank subject to the order of the Bank, or its assignee. He prays for an injunction, and that his tender may be declared good, and the assignment void.

The answer on the part of the Bank and of Sessions, asserts the *bona fides* and the validity of the assignment, and denies that the assignee is bound to receive in payment the notes of the Bank,

or that the plaintiff in injunction is entitled to any other compensation, or offset, than the amount credited on the judgment.

The judgment was in substance rendered perpetual, and the assignee compelled to allow in compensation and discharge of the judgment, assigned to him, the notes tendered and deposited subject to his order in bank. The Bank and Sessions have appealed.

On the trial, the offer to pay or tender both to the Bank and its assignee, and the Sheriff, in the notes of the Bank, was proved. The question was therefore, fairly presented, whether the assignee was bound to receive in payment the notes of the Bank, not shown to have been in his possession, before notice of the assignment.

The judgment debtor and plaintiff in injunction, relies upon the statute of the State of Mississippi, of 1840, which absolutely forbids the banks of that state "to transfer by endorsement, or otherwise, any note, bill receivable, or other evidence of debt;" and which requires the banks, at all times, to receive their own notes in payment.* On the other hand, it has been ingeniously argued by the counsel for the assignee, that that statute is unconstitutional, and void; as it impairs the obligation of contracts, and is inconsistent with the rights of the Bank as conferred by its charter.

We had occasion, in the case of *Hyde and another* v. *The Planters Bank*, decided in the Eastern District, in July, 1844, (8 Robinson,) to pronounce our opinion upon this question, and we then held that the statute was constitutional, and allowed the compensation. Our opinion remains unchanged, and is greatly strengthened by a decision of the High Court of Errors of the State of Mississippi, to the same effect, which has been brought to our notice in their reports. 3 Smeed & Marshall, 661.

In the progress of the trial, the surety on the injunction bond was offered as a witness, after other sureties had been substituted

* The statute requiring the banks "at all times to receive their respective notes at par in the liquidation of their bills receivable, and other claims due them," was passed on the 22d of February, 1840. The act prohibiting the transfer of the bills and other evidences of debt held by the banks, was passed on the 21st of that month.

to him on the bond, notwithstanding the objection, that by the act of 1831 the surety on an injunction bond is a party to the suit, and liable to be condemned, *in solido*, with the plaintiff, for damages and interest. The court did not err in our opinion, in permitting him to testify. This question has already been settled in a case in the Eastern District.

The intervention of Budlong, was, in our opinion, properly disregarded; because, even supposing he had a right, notwithstanding the assignment, to seize the judgment, as still the property of the Bank, yet the judgment debtor would have the same right to pay him in the notes of the Bank, as to pay the assignee. There is no other difference, than between a voluntary assignment, and one by operation of law.

Judgment affirmed.

The Grand Gulf Railroad and Banking Company *v.* Nicholson Barnes.

The holder of a bill protested for non-payment, is not bound to send a notice directly to all the parties to it. If such notice be sent, it will enure to the benefit of any endorser who may pay the bill, in an action against previous endorsers, or the drawer. It is sufficient for the holder to give notice to his immediate endorser, leaving it to the latter to notify the next endorser, and so on to the drawer; one day being allowed to each party to notify his immediate endorser, or the drawer. The rule is the same where a note or bill is sent by the holder to his agent for collection. If the latter give timely notice of dishonor to his principal, it is sufficient; and a notice from the principal, seasonably sent, will suffice to charge any prior party. The agent's knowledge of the endorser's residence, does not make it necessary for him to send a notice directly to the endorser.

A notice of protest sent to an endorser at the post office at which he usually received his letters and papers at the time of the protest, and which was in the parish in which he resided, is sufficient; though it be proved that there was another office in an adjoining parish nearer to his residence, at which the endorser, at a previous period, had been in the habit of receiving his letters and papers, there being no evidence to show that he continued to receive any letters or papers there at the date of the protest.

Where it is proved that one of the subscribing witnesses to a power of attorney is dead, and that the residences of the others are out of the State or unknown, it will be admissible in evidence on proof of the signature of the principal.

The Grand Gulf Railroad and Banking Company v. Barnes.

APPEAL from a judgment of the District Court of Madison, *Curry*, J., in favor of the plaintiffs.

T. H. Farrar, for the plaintiffs. The notice was sufficient. Bailey on Bills, (ed. 1826,) 173, 174. Chitty on Bills, 315, 316. 4 Mart. N. S. 226. 5 Mass. Rep. 167. 2 Johnson's Cases, 1. *McCulloch* v. *Commercial Bank*, 16 La. 568. *Barker* v. *Whitney*, 18 La. 579. *Bank of Louisiana* v. *Watson*, 15 La. 38. *Nott's Ex'r* v. *Beard*, 16 La. 310. *Mainer* v. *Spurlock et al.* 9 Robinson, 161.

Bemiss, for the appellant.

MOPHY, J. This suit is brought on a protested bill of exchange for $4000, drawn by the defendant at Port Gibson, on Bogart & Hoops of New Orleans, and accepted by them in favor of Jessie Harper, and endorsed by the payee, and Hoops & Bogart, to the petitioners, before maturity.

The defence set up is: *First*, that the notary who protested the bill in New Orleans, failed to send a direct notice to the defendant; that he used no diligence to ascertain his residence, which was then in the parish of Concordia, and did not comply with the statute of 1827, by directing the notice to the place where the bill was dated, to wit, at Port Gibson. *Secondly*, that the notice given was bad and insufficient, having been sent to the defendant at New Carthage, when there was a post office near to his residence at Milliken's Bend.

I. It appears from the record, that the bill sued on was protested at New Orleans for want of payment, on the 3d of February, 1836, and that the same day the notary enclosed notices to the endorsers and drawer in the one which he made out for the plaintiffs, the last endorsers, and put in the post office at New Orleans, directed to them at Grand Gulf, Mississippi; that these notices were received by the cashier, J. Callender, at Grand Gulf, Mississippi, on the 11th of the same month, and that on that day, the notice for the defendant was sealed and directed to him at New Carthage, Louisiana, and placed in the post office at that place, in time to go by the next mail. This constitutes a good and legal notice. The holder of a bill is not bound to send a notice to all the parties on it. If he does, such notice will enure to the benefit of any endorser who shall pay the bill in an action

against previous endorsers, or the drawer; but he need give notice only to his immediate endorser, the latter to the next, and so on to the drawer. When this course is pursued, one day is allowed to each party to notify his immediate endorser, or the drawer. The rule is the same when a note or bill is sent by the holder to his agent for collection; if the latter gives timely notice of its dishonor to his principal, he does all that he can be required to do, and a notice from the principal, seasonably sent, will be sufficient to charge any prior party; even the knowledge of the agent of the endorser's place of residence, does not make it necessary for him to send notice directly to the endorser. Bailey on Bills, ed. of 1836, 266 and 267. 16 La. 568. 18 La. 579. The statute of 1827 provides for the case where the holder, or the notary who acts for him, cannot, after due diligence, ascertain the residence of a particular party sought to be charged; it authorizes the notice to be directed to the place where the bill is dated. B. & C.'s Dig. 43.

II. The evidence shows, that there are two post offices at some distance from the defendant's residence: one situated at New Carthage, in the parish of Concordia, at about twenty miles, and the other at Milliken's Bend, in the parish of Carroll, at about ten miles. It is shown by the defendant, that in 1833 he received some letters and papers through the latter post office, and frequently, at that time, suffered those addressed to him at New Carthage to go to the general post office; but several witnesses have testified that, at the time of the protest in 1836, he was in the habit of receiving his letters and papers through the office at New Carthage. One of them says, that he corresponded with defendant at the time of the protest, and up to 1837; that he addressed his letters to him at New Carthage, and received answers to them from that place; he thinks, that it was the defendant himself who directed him so to address his letters. If the defendant continued to get his letters, in 1836, at Milliken's Bend, as he has shown that he did three years before, he could easily have proved it. His failure to do so, impresses us with the belief that he had ceased to get them there, and has since received them at the New Carthage office, the only one in his parish, and at which place it is shown that he often had business to attend to. The

notice, then, having been sent to the defendant at the post office where he usually got his letters and papers, at the time of the protest, and which was situated in his parish, was, in our opinion, sufficient. *Bank of Louisiana* v. *Watson*, 13 La. 38. *Nott's Executor* v. *Beard*, 16 La. 310. *Mainor* v. *Spurlock et al.* 9 Robinson, 161.

A bill of exceptions was taken on the trial to the admission in evidence of a power of attorney under which J. H. Moore endorsed the bill for Hoops & Bogart, on the ground that the subscribing witnesses to said instrument were not examined. The death of one of these witnesses being proved, and the residence of the other being shown to be out of the State, or unknown, the Judge properly admitted the paper on proof being made of the signatures of the grantors. 4 La. 119. 13 La. 142. 3 Rob. 206. There are in the record several other bills of exceptions which, in our opinion, do not deserve to be noticed.

Judgment affirmed.

Ex parte David H. Groves and another.

A sale under a *fi. fa.* made before the promulgation of the statute of 6 April, 1843, ch. 135, in a parish in which a newspaper was published at the time, and not advertised therein as directed by art. 669 of the Code of Practice, will be annulled, unless in cases embraced by the statute of 25 February, 1828, ch. 29, where the amount of the judgment under which the seizure was made, is less than three hundred dollars.

Where the price bid at a sale under a *fi. fa.* does not exceed the amount of anterior special mortgages existing on the property, there can be no adjudication. C. P. 684.

Appeal by Groves and Lee from a judgment of the District Court of Madison, *Curry*, J., annulling a sheriff's sale made to them.

Bemiss and *Shannon*, for the appellants.

Stockton and *Steele*, contra.

Bullard, J. This is a monition sued out by Groves and Lee, who represent that they became the purchasers of certain lots of

land at a sheriff's sale, made in pursuance of several writs of *fieri facias*, against the property of one Stone, an absentee.

The attorney appointed to defend the absentee, and Green, surviving partner of the firm of Miller & Green, and the curator of the vacant estate of the deceased partner, Miller, made opposition, and pray that the sale may be annulled. The grounds of opposition are: *First*, that there was no legal advertisement of said sale in the newspaper published in the parish; *Secondly*, that the property was, at the date of the sale, encumbered by mortgages, which, by the terms of the sale, the purchasers did not assume to pay; and that, by reason of those informalities, the property which was appraised at $12,000, was sold for $700, on a credit of twelve months, subject to mortgages to the amount of $4500.

The previous adjudication of the same property to Miller & Green, through their alleged agent, Reading, may be laid entirely out of view, because it is clear, that the terms of the adjudication were not complied with, and the Sheriff had a right to proceed and sell the property again.

The record exhibits a certificate of mortgages, which shows that the land was much encumbered. Among others, there was a mortgage in favor of Miller & Green. The Sheriff's return shows, that the land was sold in virtue of four different writs of *fieri facias*, and that $700 only was bid for the property at a year's credit.

The Sheriff's sale took place on the 9th day of August, 1842; and the first ground of opposition is, that the sale was not advertised according to law in the newspaper, which is shown to have been published at that time at Richmond, the seat of justice of the parish of Madison. It was not until March, 1843, that the act of the legislature was approved and promulgated, entitled, "an act relative to the advertisement of judicial sales and monitions," which dispensed with such advertisement in a newspaper, when one is published in the parish. By the act of February 28, 1828, such publication was dispensed with, it is true, in cases where the amount of the judgment by which such seizure had been ordered, shall be less than three hundred dollars. But this case does not come within the exception. There was but one paper published in the parish of Madison, and there is no evidence in the

record that the sale, which took place in August, 1842, was preceded by advertisement published therein, as required by art. 669 of the Code of Practice.

The second ground of opposition was, in our opinion, equally well founded. Nothing shows that the purchaser bid something over and above the previous special mortgages which existed on the property, without which no sale could be made. We have often held, that such previous encumbrances form essentially a part of the price for which the property is sold, and especially in a recent case in the Eastern District.* The bid here was only $700, and there could be no sale according to art. 684 of the Code of Practice.

Judgment affirmed.

ROBERT ENGLISH and another *v.* JAMES M. WALL and others.

On a motion to dissolve an attachment for insufficiency of the affidavit, the judge not having signed the certificate that the affidavit had been made before him, it appeared that the words, "Sworn and subscribed before me," were written across the affidavit in the hand-writing of the judge, but that they were not signed by him; that the order allowing the attachment recited that the judge had read the petition, affidavit, &c., and was written immediately before these words, on the same paper, and was signed by the judge; and that the unfinished certificate as to the oath and the order, bore the same date. *Held*, that the attachment should be maintained: that the judge acted on the affidavit as one sworn to before him; and, in signing the order containing that expression, by the strongest implication certified that it had been sworn to before him.

The drawer of a bill, on the face of which there was a waiver of acceptance, is not entitled to notice of its dishonor, and will not be discharged by its omission, where he had no funds in the hands of the drawee, but was to place the latter in funds to pay the bill at maturity, and it was not expected that the drawee, would pay without such deposit; but the bill must be presented for payment on the last day of grace, or he will be released.

An unincorporated association of individuals formed for the purpose of dealing in exchange, is a commercial partnership within the terms of art. 2795 of the Civil Code; and the members are responsible, *in solido*, for the debts of the society.

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* See *Bludworth et al.* v. *Hunter et al.* 9 Rob. 256. *M'Rae* v. *Chapman et al.* 10 Rob. 65. *Perry* v. *Holloway*, ib. 107.

APPEAL from the District Court of Madison, *Curry*, J.

BULLARD, J. This suit was commenced by attachment. The plaintiffs sue the defendants as partners of a private unincorporated association in the State of Mississippi, called the "Real Estate Banking Company," on several protested bills of exchange, drawn by the association, and several certificates of deposit, of which the plaintiffs allege themselves to be the holders. There was, at first, a judgment of nonsuit against the plaintiffs, but, upon a new trial being granted, the second trial resulted in a judgment against the defendants for the amount of the certificates of deposit only; and the defendants have appealed. In this court, the attorney of the appellees answers, that there is no error in the judgment to the prejudice of the appellants; but that it is erroneous as to the plaintiffs, who were entitled to a judgment for the full amount demanded, as well upon the protested bills of exchange, as upon the certificates of deposit; and he prays, that the judgment may be amended accordingly.

It is first proper to notice a motion to dissolve the attachment, which was overruled by the court. It was alleged, that there was no sufficient affidavit, the defect pointed out being, that the Judge had not signed the jurat. There is written across the affidavit the words, "sworn and subscribed before me," in the hand-writing of the Judge, but not signed by him. Immediately below, and on the same paper, is written the *fiat*, ordering the attachment to issue, which is signed by the Judge. Both the unfinished *jurat* and the order for the attachment, bear the same date. That order recites that the Judge had read the petition, affidavit, and documents annexed. He, therefore, acted on it as an affidavit sworn to before himself; and, in signing the order containing that expression, by the strongest implication certified that it had been sworn to before himself. We think that, if the matter set forth in that affidavit should prove to be false, evidence of the hand-writing of the deceased Judge, and his signature to the order for the attachment, together with the signature of the affiant himself, would be sufficient to support an indictment for perjury. The Judge did not err in overruling the motion to dissolve the attachment. 3 Rob. 236.

Upon the merits; the record shows that the defendants were

members of the association, or private partnership; and that the instruments sued on were executed by the regular officers of the company, according to their mode of doing business. The liability of the defendants is, in our opinion, sufficiently established, as to the certificates of deposit.

But it becomes necessary to inquire, on the prayer of the appellees, whether they are not equally liable to pay the two checks or bills of exchange sued on, which are signed by the same officers. The first is for $1450, dated August 16, 1839, drawn upon the cashier of the New York Banking Company, four months after date, *waiving acceptance*. It appears to have been protested for non-payment, on the 16th of December, 1839. The second is in the same form, for $1300, at four months after date, and dated August 29, 1839. It was twice protested; once on the 28th of December, 1839, and again, on the 1st of January, 1840; but no notice appears to have been given to the drawers. It is shown, that the drawers had no funds in the hands of the New York Banking Company, but that they were to place funds there to meet the checks or drafts. It was not expected that the drawee would pay without such deposit. One of the witnesses testifies, that these checks or bills of exchange were not drawn against funds at that time in the hands of the New York Banking Company, but against funds to be provided by the cashier of the Real Estate Banking Company, who was then in New York, to meet them at maturity. Under such circumstance the drawers were not entitled to notice of the dishonor of the bills. Story, in his Treatise on Bills of Exchange, lays down the law to be, that "ordinarily, if the drawer draws the bill without having funds in the hands of the drawee or expectation of funds, or any arrangement or agreement *on the part of the drawee*, to accept the bill, he will not be entitled to notice, and not discharged by want thereof." Sec. 311.

But we are of opinion that the drawers had a right to expect that the bill should be regularly presented for payment on the last day of grace. That was done with respect to the second bill which fell due on the 29th of December, and was protested for non-payment, on the 1st of January; but the first bill does not appear to have been presented at all after the 16th of De-

cember, and the 19th of that month was the last day of grace. The plaintiffs are, therefore, further entitled to recover, in our opinion, the amount of the draft of the 29th of August, 1839, that is thirteen hundred dollars, with interest.

But it is contended by the counsel for the appellants, that the Real Estate Banking Company being composed of a large number of persons, not incorporated, was not a commercial partnership, and, consequently, that each partner is bound only for his virile share; and he contends that, in the absence of any proof as to the law of Mississippi, our own law is applicable. We are, however, of opinion, that the association was essentially a commercial partnership, within the terms of art. 2795, as it is shown they dealt in exchange, and especially in that species commonly called *Kites*, which is, in truth, the character of the bills sued on in this case.

It is, therefore, adjudged and decreed, that the judgment of the District Court be affirmed, except as to the nonsuit in relation to the bill of exchange; and it is further ordered and decreed, that the plaintiffs recover of the defendants, *in solido*, the further sum of thirteen hundred dollars, with interest at eight per cent, from the 1st of January, 1840, and costs in both courts.*

Stockton and *Steele*, for the plaintiffs.

Dunlap and *Thomas*, for the appellants.

BENJAMIN HATCH and another *v.* ROBERT ENGLISH and another.

Where a *fi. fa.* has been issued against a defendant before notice of judgment served on him as required by law, he may require that the *fi. fa.* be quashed, and a suspensive appeal allowed. But where he contents himself with taking a devolutive appeal only, he cannot afterwards complain.

A judgment of nonsuit having been set aside, and a new trial allowed, at the succeeding term after the new trial had, and a judgment entered on the minutes for the plaintiff, the judge by mistake signed the judgment of nonsuit, which had been transcribed on the petition. *Held*, that the judgment of nonsuit, having been set aside within the time prescribed by law, was a nullity, and could not be reinstated by the subsequent inadvertent signature of the judge.

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* See notice of application for a re-hearing in the case of *Hatch and another* v. *English and another, infra.*

Hatch and another v. English and another.

APPEAL from a judgment of the District Court of Madison, *Curry*, J., dissolving an injunction obtained by plaintiffs, with damages.

Thomas, for the appellants.

Stockton and *Steele*, for the defendants.

BULLARD, J. This action grew out of the one just decided of *English et al.* v. *Wall et al.* It was commenced by an injunction to stay proceedings on a writ of *fieri facias*, issued on the judgment rendered in that case. The injunction was obtained upon the allegation, that, in the case of English and another against the petitioners, an execution had issued and was in the hands of the Sheriff, and that he had levied it upon their property; that the judgment on which said execution is founded, is entirely void, the suit in which it had been rendered having been dismissed on the 19th of May, 1843, by judgment of nonsuit, duly entered and signed, from which judgment of nonsuit no appeal was ever taken; nor was the suit in any way reinstated on the docket of the court; yet, that on the 23d of November, 1843, the Judge signed a judgment against the petitioners for about $2000, and upon this judgment the execution has issued. That the suit having been dismissed by judgment of nonsuit, they took no further notice of it, and did not know of the judgment of November, 1843, until a long time after its rendition, so that they did not receive notice of judgment in time to take a suspensive, but that they have taken a devolutive appeal, which is now pending. They pray for an injunction, and that the judgment may be annulled, and for general relief.

The last ground for the injunction may be laid entirely out of view, because if, in point of fact, there was no notice of judgment as required at that time, the defendants were still entitled to a suspensive appeal; and we must presume that it would have been granted, and the writ of *fieri facias* quashed, upon the filing of a bond, as required for a suspensive appeal. This was not attempted, and the defendants contented themselves with taking a devolutive appeal only. They cannot now complain that they were entitled to one of a suspensive character, when that has not been refused them.

It only remains to inquire whether the final judgment ren-

dered, was a nullity, because a nonsuit had been given at a previous term, and signed by the Judge.

The whole record in the original case was given in evidence in this; and it clearly appears, that the judgment of nonsuit first rendered, was set aside *before it was signed*, and that a new trial was granted contradictorily with the attorney appointed by the court to defend the absentees, and that he assisted on the new trial upon which the final judgment was rendered. The counsel appointed by the court to defend the absentees testified, on the trial of this case, that he had knowledge that the judgment of nonsuit was signed at the May term, 1843; that it is to his knowledge that a judgment of nonsuit had been rendered at a previous term, and afterwards a new trial granted, and that at the May term, 1843, he represented the defendants on the new trial. This evidence was, we think, properly admitted, to show that the judgment of nonsuit which had been rendered and set aside at one term, as it appears by the record, was inadvertently signed by another judge at a subsequent term of the court.

The judgment of nonsuit which had been set aside on motion, in presence of the defendants' counsel, was a nullity, which was not reinstated by the subsequent inadvertent signature of the Judge, who, as it appears by the record, presided at the new trial, and himself signed* the final judgment which it is the object of

* This is a mistake—the judgment was rendered by him, but signed at a subsequent term by another judge. The record shows, that on the 3d of December, 1842, a judgment of nonsuit as to the whole claim was entered on the minutes of the court, and on the same day a motion for a new trial made, and allowed. This judgment was not signed, nor does the record show the name of the judge who then presided. In the argument of one of the counsel it is stated that *Willson*, J., presided. The record shows that, on the 10th May, 1843, *Willson*, J., presiding, evidence was taken in writing, and that on the same day a judgment was entered on the minutes in favor of the plaintiffs for $1611, with interest and costs, and a judgment of nonsuit against them for the rest of their claim, but not signed. At the same term, on the 19th of May, 1843, the judgment of nonsuit as to the whole claim was signed by *Willson*, J., evidently through error. At the next term, on the 23d of November, 1843, the judgment entered on the minutes, on the 10th of May preceding, by *Willson*, J., in favor of the plaintiffs, for $1611, &c., was signed by *Curry*, J.—Reporter.

this suit to annul. In the case in 6 La. 69, referred to by the counsel for the appellant, we recognize the principle, that a judgment once signed, becomes the property of the party in whose favor it has been rendered; but that presupposes a case where such judgment had not been set aside, and a new trial granted within the time prescribed by the Code. The record shows that such was the case here, and the judgment of nonsuit was evidently signed after it had ceased to have any legal existence.

*Judgment affirmed.**

Ayres P. Merrill *v.* David Lattimore.

A petition signed by the plaintiff's attorneys, in their own names, without describing themselves as attorneys for the plaintiff, is sufficient. C. P. 172.

Where a petition is excepted to for the omission of a mere matter of form, the plaintiff may amend *instanter*, and the defendant cannot require time to answer such amendment, nor require that the amended petition should be served upon him.

Amendments to a petition may be allowed as well before as after issue joined.

Appeal from the District Court of Concordia, *Willson*, J.

Simon, J. This is an appeal taken by the defendant from a judgment by default, rendered and made final under the following circumstances:

This suit having been instituted upon two notes of hand and a small account, the defendant filed an exception to the plaintiff's petition, and declined answering thereto, upon the ground that said petition is not signed by the plaintiff himself, nor by any other person for him.

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* *Thomas*, for the appellants, prayed for a re-hearing in this case, and in that of *English and others* v. *Wall and others*, *supra*, p. 132, contending that the judgment in favor of the original plaintiffs, pronounced and entered on the minutes by *Willson*, J., at the May term, 1843, and signed by *Curry*, J., at the ensuing November term, should be annulled, because it was not signed by the Judge who pronounced it, nor at the same term of the court, citing Code of Pract. arts. 546, 586, 603. Const. La. art. 4, s. 12. Bullard & Curry's Digest, 358. 2 Mart. 136. 7 Mart. 520. 3 Mart. N. S. 165. 2 Robinson, 324. 8 Mart. N. S. 234. 12 Mart. 358.

Re-hearing refused.

The petition is signed by "*Fred. H. and Thos. P. Farrar,*" without qualifying themselves as the attorneys for plaintiff, and without any addition to their names; and the District Judge having sustained the defendant's exception, said plaintiff took a bill of exceptions to said Judge's opinion that the signature of his counsel was insufficient.

The plaintiff, however, by leave of the court, amended his petition by adding the words "*attorneys for petitioner,*" under the signature of his counsel; whereupon a judgment by default was regularly entered; but, on the day it was to be made final, the defendant's counsel filed a written motion to have it set aside, for the reason that the court having decided that the petition filed was not signed according to law, and an amendment being allowed, default was entered *instanter* without any service of the amended petition. This motion was overruled, and the defendant's counsel took a bill of exceptions; whereupon, no answer being filed, the judgment by default was made final, after sufficient evidence was adduced by the plaintiff in support of his demand, and an attempt made by him to prove the rate of interest allowed by the statutes of the state of Mississippi, where the notes sued on were executed.

It is clear, in our opinion, that the defendant's exception to his answering to the plaintiff's petition, was improperly sustained. It is true, that art. 172 of the Code of Practice, requires that the petition be signed by the plaintiff, or his attorney in fact, or *by his advocate;* but here, it was signed by the plaintiff's advocates, who, with or without the addition to their names of the words "*attorneys for petitioner,*" had a right to sign it, and to represent their client in a court of justice. Attorneys at law are generally known to the courts before which they practice; their admission to the bar, and the oath which they take on receiving their licenses, are matters of record in this court, and as such should be taken notice of by the courts of inferior jurisdiction before which such attorneys are bound to produce their licenses when required; and, when their names are spread upon the records of the tribunal where they litigate and defend the rights of their clients, they should, at least, be presumed to act in their capacity of advocates, unless their right to practice as such is disputed.

Their authority to sign a petition, and to appear in court as advocates, is derived from their licenses, and not from the quality which they may add to their signatures; and it seems to us, that the authority of Fred. H. and Thos. P. Farrar to act as advocates, not being denied or disputed, their simple signature to the petition had as much effect to show the capacity in which they acted, as if it was followed by the words "attorneys for petitioner," which attorneys at law are in the habit of adding to their signatures. See the case of *Rowlett* v. *Shepherd*, 7 Mart. N. S. 513.

The Judge, *a quo*, however, being of opinion that the exception was valid, properly permitted the plaintiff to amend; and, we think, that the defendant was then bound to answer to the petition, or to suffer a judgment by default to be taken *instanter* against him, without its being necessary to serve a new copy of the petition, so amended, upon him. He was in court, under his exception, and was bound to take notice of the amendment allowed, in consequence of its having prevailed. It is well settled, that if an amendment be a mere matter of form, the defendant cannot be allowed time to answer over to such amendment. 3 Mart. 404. *A fortiori*, has he no right to require that such amendment be served upon him. Amendments may be allowed as well before, as after issue joined. 1 La. 433. If the petition do not state the plaintiff's residence, on exception, said plaintiff may be allowed to amend; (6 La. 380;) and where the plaintiff mistakes the true name of the defendant in his petition, he may be permitted to amend and correct it *instanter*, even after the original petition is served. 8 La. 298. 12 Ib. 7. Here, the amendment deemed necessary below, was immaterial and merely formal; the defendant was bound to file his answer, in order to avoid the effect of the judgment by default; he had ample time to do so before it was made final; and we think the Judge, *a quo*, did not err in overruling his motion to set it aside.

The judgment appealed from, however, allows the plaintiff six per cent interest, *per annum*, on the amounts of the notes sued on, from the maturity of said notes until paid, while they do not bear any; and no legal proof was adduced to show, that such is the rate of legal interest fixed by the laws of the state of Mississippi; and we think it ought to be corrected in this respect. It is true, the

record contains a document purporting to be a law of the state of Mississippi; but it is certified by no one, and it does not appear to have been proved as required by law to entitle it to be received in evidence. There is, therefore, no sufficient proof to warrant the judgment for interest at the rate of six per cent; and it should be reduced to five per cent under our law, to run from judicial demand.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, except that instead of six per cent interest, *per annum*, therein allowed, the plaintiff be only entitled to recover five per cent on the amount of said judgment from judicial demand until paid; and it is further ordered, that the costs in the lower court be paid by the defendant and appellant, those in this court to be borne by the plaintiff and appellee.

F. H. and *T. P. Farrar*, for the plaintiff.

Shaw and *Lawrence*, for the appellant.

Augustus Whiting and another *v.* Horace Prentice and others.

The prescription of five years, established by art. 3505 of the Civil Code, does not apply to a promissory note not transferable by endorsement or delivery. Such a note is prescribed by ten years. C. C. 3508.

A creditor having obtained a judgment against his debtor, caused certain property to be sold under execution, and became the purchaser. In an action by other creditors, against the debtor and purchaser, to annul the sale as fraudulent and intended to give an unjust preference to the latter, plaintiffs offered to prove declarations made by the debtor, out of the presence of the seizing creditor, tending to establish the fraudulent intention of the parties: *Held*, that the evidence, though insufficient to prove the alleged fraud as against the seizing creditor, was admissible.

To annul a sale, at which the plaintiff in execution became the purchaser of the property sold, on the ground that the latter knew that the debtor was insolvent, and that the sale was made with intent to defraud other creditors, plaintiff must prove that the purchaser knew that the debtor was insolvent.

Where the owner of a plantation, whose title has been divested by a sheriff's sale, is retained by the purchaser on the plantation as a manager, his possession becomes that of his employer. C. C. 3396, 3398, 3401.

Appeal from the District Court of Carroll, *Willson*, J.

Browder and *Ryan*, for the appellants.

Stacy and *Sparrow*, for the defendants.

Simon, J. This is a revocatory action instituted on the following allegations: that the plaintiffs are judgment creditors of Horace Prentice, the first defendant, for the sum of $686, with interest, for which two executions have issued and been returned "no property found," so that the debt is still due and unpaid. That at the same term of the District Court, at which the plaintiffs' judgment was obtained, to wit: on the 18th of April, 1842, said Prentice in open court, confessed judgment for the sum of $20,000, in favor of Maunsel White & Co., which judgment was signed on the same day, bearing ten per cent interest until paid. That said Prentice was insolvent at the time said judgment was confessed by him, and that the said M. White & Co. well knew, that the said Prentice was, at that time, in insolvent circumstances.

They further represent, that the said Prentice intended by the said act of confession, to confer an unjust preference on the said M. White & Co., to the injury of the plaintiffs. That the property, to wit: lands and slaves, &c. belonging to Prentice, was seized and sold in pursuance of said judgment, and M. White became the purchaser thereof, which property is yet in the possession of Prentice; all which was done fraudulently, and for the purpose of conferring an unjust preference over other creditors. That the obligation upon which the said confessed judgment was founded, was extinguished by prescription, and was therefore illegal, fraudulent and collusive between the parties, and could not be revived to the prejudice of Prentice's other creditors. They, therefore, pray that the judgment and proceedings had by virtue thereof, may be annulled and set aside as illegal and unjust, and that the property be decreed to be liable to be seized and sold to satisfy the plaintiffs' demand, &c.

Prentice answered by pleading the general issue. His co-defendants also pleaded the general issue, admitting that a judgment was by them obtained against their debtor, but denying any fraud in the transaction, or that the debt sued on was prescribed. They further deny, that the sale of Prentice's property under execution, made to satisfy their judgment, was fraudulent; and al-

lege that the same was made in good faith, and vested a good and perfect title in Maunsel White.

The cause was submitted to a jury who found a verdict in favor of the defendants; whereupon, said verdict having been made the basis of the judgment of the District Court, the plaintiffs, after having unsuccessfully attempted to obtain a new trial, took this appeal.

This revocatory action is based upon the alleged facts, that at the time the judgment of Maunsel White & Co., was confessed and signed, Prentice was, to the knowledge of said creditors, in insolvent circumstances; that the object of the confession was to give them an undue preference over their debtor's other creditors; that the debt upon which the confessed judgment was obtained, was extinguished by prescription; and that the property, though sold, has never ceased to remain in Prentice's possession.

The record shows that, on the 18th day of May, 1836, Prentice and Clary executed an act of mortgage in favor of M. White & Co., in which it is declared that, whereas they, Prentice and Clary, effected an arrangement with Messrs. M. White & Co., whereby the latter have agreed to make and furnish appropriations in money, for the accommodation of Prentice and Clary, to the amount of $20,000, at such times and in such sums not exceeding said amount, as may best suit their convenience, the said Prentice and Clary have executed their obligation for the payment of said sum in favor of the said Maunsel White & Co., for the sum of $20,000, &c., which is secured by a special mortgage on Prentice's property, described in the act. The said sum of twenty thousand dollars is also declared in said act, to have been appropriated and furnished to Prentice & Clary by Maunsel White & Co.; and *to secure the latter against any and all responsibilities and losses whatsoever* which they may in any manner sustain by reason of the said appropriations and advances, Horace Prentice declared, that he *mortgaged and hypothecated with the force and effect of a judgment confessed*, to and in favor of M. White & Co., the following described property, &c. Prentice's wife intervened in the act to renounce her legal and tacit mortgage in favor of the said M. White & Co.

On the day the mortgage was executed, a note was given to

M. White & Co., for the sum of $20,000, dated the same day, and subscribed by H. Prentice and D. G. Clary, in the words following, to wit: "On the first day of February next, eighteen hundred and thirty-seven, we, Duke G. Clary and Horace Prentice, merchants in the town of Providence, in the parish of Carroll, in the state of Louisiana, &c., *do hereby promise and obligate ourselves to pay to Maunsel White & Co.*, merchants in the city of New Orleans, *the sum of twenty thousand dollars with interest*, at the rate of ten per cent per annum, from the day on which the said twenty thousand dollars are delivered to us by the said Maunsel White & Co., *being money borrowed by agreement as per mortgage for the same, of even date herewith.*"

It further appears, that on the 18th of April, 1842, a petition was presented by M. White & Co., to the Judge of the District Court, on the aforesaid note and act of mortgage, praying for judgment against H. Prentice for the sum of $20,000 with interest, and for the seizure and sale of the property mortgaged. Service of said petition was acknowledged by the defendant, who confessed judgment in favor of the plaintiffs, whereupon, judgment was rendered on the same day, ordering the property described in the act of mortgage to be seized and sold according to law. This was done on the ensuing day, and on the 4th of May the execution was levied on all the said mortgaged property, and upon a certain number of slaves, &c., which having been regularly advertised for sale, were adjudicated to Maunsel White on the 11th of June, 1842, for an amount sufficient to satisfy the debt and interest due thereon; said amount being two-thirds of the estimation not complained of.

The parol evidence adduced on the trial, establishes the justness and legitimacy of the debt due to Maunsel White & Co.; nay, there seems to be no dispute as to the existence of said debt, and if there had been any, we think that it is fully and clearly made out by the testimony. It is not pretended that the Sheriff's proceedings in carrying the execution into effect, were not fairly and legally conducted.

Under the pleadings and the evidence, this case presents on its merits, but two questions for our solution: 1. Was the obligation

sued on by M. White & Co., prescribed at the time of the institution of their suit against Prentice?

2. Was their suit brought, and was the judgment confessed, with the fraudulent intent of obtaining an undue preference on Prentice's property, to the prejudice of his other creditors, he, Prentice, being at the time the proceedings were instituted, in insolvent circumstances?

I. The first question must be answered in the negative. We have already seen that the note or obligation on which M. White & Co., obtained their judgment, or order of seizure and sale, against Prentice, is not a negotiable instrument. It is a mere written promise on the part of Prentice and Clary to pay a sum of money loaned, or to be loaned to them by the payees, and not transferable by endorsement or delivery. Now, art. 3505 of the Civil Code, on which the plaintiffs rely in support of the prescription which, they say, was applicable to the debt claimed by M. White & Co., provides, that "*actions on bills of exchange, notes payable to order or bearer*, except bank notes, *those on all effects negotiable or transferable by endorsement or delivery, are prescribed by five years*, reckoning from the day when these engagements were payable." The terms of this article are too plain and too clear to require any comments. The note or obligation of Prentice and Clary is not payable to order or bearer; it is on its face a simple personal obligation, the payment or performance of which is secured by mortgage, and cannot be extinguished but by the prescription of ten years. Civ. Code, art. 3508. Only five years and two months had run out at the time the proceedings complained of were instituted.

The view we have taken of this first question, renders it useless that we should notice the two first bills of exceptions found in the record;* but we think, however, that the evidence was properly admitted, for the purpose at least of showing the fairness of the transactions between Prentice and M. White & Co., and the justness of the latter's demand.

* These bills of exceptions related to the introduction of evidence to prove acknowledgments of the debt by Prentice, within five years preceding the institution of the suit.—R.

II. Before investigating this point, it is proper that we should dispose of the third bill of exceptions found in the record, taken by the plaintiffs' counsel to the opinion of the Judge, *a quo*, refusing to admit evidence "to prove that H. Prentice, one of the defendants, had made disclosures and admissions in relation to the sale to M. White, *out of the presence of White*, that would show the fraudulent intention of the parties." The testimony offered was objected to on the ground that Prentice's admission could not affect his co-defendants.

We think the Judge might properly have received the evidence offered, since although it was not sufficient to show that the purchaser at the Sheriff's sale, acted from any fraudulent motive, the circumstance of its having no effect against the latter, is not a good objection to the introduction of the testimony; and because, if no other proof was adduced, so as to establish the allegations of fraud against the appellees, the latter could not have been affected thereby. 2 Mart. N. S. 13. But the plaintiffs having failed to prove any fraudulent intention, on the part of White & Co., in any of their transactions with Prentice, the testimony offered is now without any object or bearing on the cause as against them; it cannot affect their rights as acquired under the Sheriff's sale,* even supposing the proof of Prentice's admissions and disclosures, made out of their presence, to go to the extent stated in the bill of exceptions; and, under the evidence contained in the record, we cannot see that any advantage would result in favor of the appellants, by sending the case back to the court, *a qua*, for the purpose of receiving the proof rejected.

After a careful and attentive perusal of the testimony, which we think, proves conclusively that the debt sued on by White & Co., was a just one, not yet prescribed, and secured by a special mortgage on part of the property which was subsequently seized and sold to satisfy it, we have been unable to discover that any fraud was intended by them in the recovery of their said debt. With regard to the tracts of land, the preference complained of already existed, by virtue of the act of mortgage executed at a time

* It appears from the Sheriff's return that the sale was made to "Maunsel White, plaintiff in the suit"—not to Maunsel White & Co.—R.

when the acts of Prentice could not be suspected; said act was one, not only importing, but showing upon its face a confession of judgment. Prentice may, perhaps, have been in insolvent circumstances at the time the judgment was obtained; but his insolvency, which is left very uncertain by the evidence, was not a declared and notorious one, and the debt for which the judgment was confessed was not one which could be contested. The debtor did not fail, and it cannot be said that said judgment was obtained within ten days preceding his failure. Civ. Code, art. 3325. Here White & Co., in issuing their execution, acted partly under their act of mortgage. It is true, they caused other property to be seized and sold, but all the property seized was not sold; there remained a tract of land unsold after satisfying the execution, and five slaves which had not been seized; and it was perhaps the duty of the plaintiffs to discuss them, previous to instituting this action. Civ. Code, art. 1968. Furthermore, it is not shown that White & Co. had any such sufficient knowledge of the state of Prentice's affairs, as to be enabled to consider him insolvent. It is true, they urged their claim against him, but this is no reason why it should be inferred that they knew his insolvency; such knowledge must be brought home to them. Civ. Code, art. 1979. It seems, on the contrary, from the evidence, that on a fair estimation of the property he possessed at the time of the seizure, such property was more than sufficient to cover his debts. Civ. Code, art. 1980. No fraud can hardly exist or be imputed, where the object of the creditor is only to enforce a just and legal right against his debtor; in such cases, "the law favors the vigilant," and if any fraud exist in the proceedings had for the adjustment of those rights, it should be shown. Here the jury thought that the fraud alleged was not made out; the Judge, *a quo*, was of the same opinion, when he refused to allow a new trial; and we are satisfied that no error has been committed.

With regard to the fact that Prentice continued, after the sale, to remain in possession of the property, the evidence shows that he was employed by White & Co., as their overseer, for a certain salary; that otherwise he had nothing to do with the property; that the title transferred by the Sheriff was a *bona fide*

one; and that Prentice having been retained by the purchasers to manage the plantation during their absence, his possession became that of his employers. Civ. Code, art. 3396, 3398 and 3401. All this is fully explained by the testimony.

Judgment affirmed.

SHAPLEY OWEN *v.* WILLIAM G. HOLMES, Executor of John D. Harding, deceased.

The prescription of one year established by art. 3499 of the Civil Code, does not apply to the claim of one who has paid for another bills due by him to an innkeeper. Such a claim is only prescribed by ten years. C. C. 3508.

The prescription of three years established by art. 3503 of the Civil Code against actions for the recovery of money lent, does not apply to the claim of one who has paid the bills or obligations of another, at his request, either in money or by drafts on a third person. Such an action is only prescribed by ten years. C. C. 3508.

A promissory note, not transferable by endorsement or delivery, is not prescribed by five years. C. C. 3505.

Where one pays the debt of another at his request, the action to recover the money advanced is not prescribed by the prescription applicable to the debt itself. The action to recover the amount is a personal one, which is only prescribed by ten years. C. C. 3508.

APPEAL from the Court of Probates of Carroll, *Bosworth*, J.

SIMON, J. The state of this case is this: John D. Harding died on the 30th of December, 1842, and, in February, 1843, the defendant, Holmes, qualified as the executor of his estate under the will of the deceased. The plaintiff, a short time afterwards, presented to the executor a detailed account of certain sums which he claimed against Harding's estate for money advanced, payments of liabilities, notes, bills, &c., and interest thereon, amounting altogether to $4455 06, at the foot of which account the executor declared, in writing, that he had no objection to allowing the claim as a just demand against the estate, &c.; and a few days after, the plaintiff instituted the present suit to have his claim liquidated by a judgment. The defendant did not answer, and a judgment by default was taken against him; but the universal legatee of the deceased intervened to resist the plain-

tiff's demand, on the grounds that the debt sued on was never contracted by the deceased; that the interest of ten per cent claimed thereon is illegal, and cannot be allowed; and that the debt is prescribed, and was prescribed, before it was allowed by the executor, by the prescriptions of one, three and five years.

Judgment was rendered below in favor of the plaintiff for divers sums, amounting altogether in principal to $2744 70, some of them with legal interest from judicial demand, and others with ten per cent interest; and from this judgment, the intervenor appealed.

It appears from the evidence, that the plaintiff and the deceased had been in partnership in planting, until the fall of 1836, when the latter sold his half of the partnership property to the plaintiff for the sum of $15,371 25, payable in three equal annual instalments from the first of January, 1837, for which the purchaser furnished his three notes to the deceased; and it was agreed in the contract, that if the plaintiff should, at any time, before the same became due, pay any money on account of the contract, &c., that he should be entitled to discount from Harding, at the rate of ten per cent *per annum*. After the date of the sale, and at different periods, the plaintiff paid divers sums for Harding on the latter's obligations which he took up for him, and made him divers advances by paying his bills in the manner set forth in the account presented; the most prominent items of which consist in a sum of $1161 66, the amount received by Harding on plaintiff's draft in favor of Holmes, on Watt, Burke & Co., being a balance due said plaintiff from his half of Harding and Owen's crop of cotton, dated 11th of April, 1837;—in the sum of $655 75, as the amount of a due bill dated 14th of December, 1836, in which Harding declares under his signature, that there is due by him on settlement, for value received, of S. Owen, the aforesaid sum of money;—in the sum of $351 34, paid by plaintiff, in 1837, for the deceased, on a joint and several note of both partners for $2224;—in the sum of $166 70, being the price of a gold watch, which plaintiff paid to one Smith for the deceased, on the joint note of the partners, on the 3d of January, 1837;—in the sum of $150, which was the difference in value coming to the plaintiff, on a partition of negroes made between

the partners, in 1836;—in the sum of $104, being one-half of the purchase money of lot 53 from the government, the whole of which was paid by plaintiff;—in the sum of $100, being one-half of the amount paid by plaintiff to Newcomer, for lot 53;—and in divers small sums paid by plaintiff for tavern bills, traveling expenses, officers' fees, &c., one-half of which is charged to the deceased.

The above sums, which were allowed by the Judge, *a quo*, appear to have been satisfactorily proven by the evidence. Indeed, we are satisfied that they were due by the deceased to the plaintiff, and that they were properly allowed. The deceased often acknowledged that he was in debt to his former partner, and, without its being necessary to give any further statement of the testimony which the record contains, and which bears on the items which were proved, and for which the vouchers have all been produced, it will suffice to say that, in this respect, there is no error in the judgment appealed from. There are but two points to be considered, to wit: one relative to the prescriptions pleaded by the intervenor, and the other with regard to the interest of ten per cent allowed below, on some items of the claim.

I. None of the prescriptions pleaded are applicable to the divers sums allowed below: neither of them comes within art. 3499 of the Civil Code, so as to be prescribed by one year, as to the plaintiff, who paid bills due by the deceased to innkeepers and others; none of the said items are for money lent directly to Harding, in the sense of art. 3503, although the sums claimed are for advances in money, made to him through a draft and other vouchers, which show how said sums were advanced, but which show also the title under which they are claimed, amounting to a liquidation of the amounts, which takes them out of the prescription of three years; and the due bill sued on, amounting to $655 75, is not prescribed by the prescription of five years, because it is not made payable to order or bearer, and is not transferable by endorsement or delivery. Civ. Code, art. 3505. See the case of *Whiting and another* v. *Prentice and others*, just decided, *supra*, p. 141. We do not understand that when an individual pays the debt of another, at the latter's request, the ac-

tion to recover the money advanced for that purpose, should be prescribed by the same prescription which is applicable to the debt itself; in such a case, the claim becomes one of the personal actions which are only prescribed by ten years. Civ. Code, art. 3508.

II. The interest of ten per cent given on some of the sums allowed, was not sustained by the evidence, and ought to have been rejected. It is true, the contract of sale produced on the trial below, stipulates a discount of ten per cent on any sum paid before it becomes due on account of the contract; but nothing shows that those sued for were ever considered by the parties as paid on account of the price of the sale; the contract is not declared upon in the petition as being the basis of the claim; no evidence has been adduced to show what became of the notes, and why they were paid by the plaintiff, without requiring the credits and the discount thereon; and the record contains no legal proof that the deceased ever agreed to pay interest, at the rate of ten per cent, on the sums he owed to the appellee.

It is, therefore, ordered and decreed, that the judgment appealed from be so modified, that instead of the interest of ten per cent therein allowed on divers sums of money therein detailed, the plaintiff be only entitled to recover five per cent interest on the aggregate amount of all his claims recognized in the said judgment, ($2744 70,) from judicial demand until paid; and it is further ordered and decreed, that said judgment be affirmed in all other respects, with costs in the court below, those in this court to be paid by the plaintiff and appellee.

Browder and *Stacy*, for the plaintiff.

Willson, for the intervenor and appellant.

James G. Bell v. Ann H. P. Lawson and Husband.

Notice of protest sent to an endorser by mail, must be addressed to him at his residence, and be directed to the post-office from which he is in the habit of receiving letters and papers, where that is the nearest to his residence.

Where a person writes to his agent that "B. holds a note of F.'s endorsed by N.," and directs him to pay the note without interest, it amounts to a promise to pay the note; and if the holder accept the promise, it will be obligatory on the person by whom it was made. C. C. 1896.

A promise by a third person to pay a bill or note for the endorser, to be binding on the former, must be made with full knowledge by him of any want of due diligence on the part of the holder which may have exonerated the endorser; but direct proof of such knowledge is not necessary. It may be inferred from the promise under the attending circumstances, as where the promise was to pay the principal due, without interest. In such a case it will be inferred that the circumstances discharging the endorser were known, for, if the protest were regular, interest would run from its date.

Appeal from the District Court of Madison, *Willson*, J.

Stockton, *Steele* and *Hyams*, for the appellant.

Bemiss, *Stacy* and *Sparrow*, for the defendants.

The endorser was discharged, by the illegality of the notice of protest. To authorize a recovery against her husband under the alleged promise, it should have been proved that he knew of the endorser's discharge at the time of his promise. The only consideration for his promise, was his belief that his wife was bound as endorser.

Simon, J. The object of this action is to recover of the defendants, *in solido*, the sum of $811 50, which is alleged to be the balance due on a note of $1000, drawn by one Saunders, to the order of Ann H. P. Noble, now Mrs. Lawson, endorsed by the latter, and protested for non-payment at maturity. Her husband Lawson is also sued as bound to pay said note, *in solido*, with his wife, on the allegation of his having promised to pay the same.

The defence is the general issue, and a special denial of any indebtedness on the part of the defendants to the plaintiff on the note sued on.

Judgment of nonsuit was rendered below in favor of the defendants, from which the plaintiff has appealed.

The note sued on is dated at New Orleans, 20th of June, 1839,

made payable twelve months after date, and was protested on the 23d of June, 1840. The certificate of notice of the notary who protested said note, states, that the parties thereto " were duly notified of the protest thereof by letters to them written and addressed, dated the day of the protest, and served on them respectively this day, (24th of June,) to wit: *notice to Ann H. P. Noble addressed to her at Vicksburg, Miss.*," which he deposited in the post-office in New Orleans, on the day and date of the protest, &c.

The parol evidence on the subject of the existence of the nearest post-office to the defendant's residence at the time the protest was made, is somewhat uncertain; but it appears, however, that if the post-office at Young's Point, which is about two miles from the defendant's, was not in operation in June, 1840, the one at Milliken's Bend, about seven miles and a half from her house, was then the nearest, since the post-office at Vicksburg is thirteen or fourteen miles distant from her residence. Several witnesses say however, that the post-office at Young's Point, was established early in the year 1840, and one says, it was established in 1839. But it is clearly proved, by the testimony of one Boyd, that the defendant, Mrs. Lawson, from 1837 to 1842, was in the habit of receiving her letters at the post-office in Milliken's Bend up to the year, 1839; that subsequently to the year 1839, she was in the habit of receiving them at the post-office at Young's Point; and that, had she been in the habit of receiving her letters at any other post-office, the witness would have been aware of it; witness was the defendant's overseer during the year 1837, and subsequently to that period, and up to the year 1842, resided at the house of Mrs. Lawson.

But it is shown by the witness Jones, that having been employed by the defendant, as her agent in New Orleans for the sale of her plantation, she required him to forward any communications to her at Vicksburg, stating that she could get her letters sooner from there, than from any other post-office; and it appears from other depositions that, in 1840, some of the defendant's neighbors used to get their letters from Vicksburg, and that letters were frequently gotten out of the latter post-office at that period for said defendant. All this may be true, but Jones does not

state at what time she gave him these instructions; it may have been long previous to 1840; she might then have been living at Vicksburg; or had particular reasons to desire her letters to be sent there; and we are not ready to say, that the desire by her expressed to Jones conferred any authority to others to address her notices of protest to Vicksburg, Miss. If she took letters out of the post-office at Vicksburg, she was also in the habit, before 1839, of receiving them at the Milliken's Bend post-office, and subsequently, she used to take them from the office at Young's Point, and it can hardly be believed that she would get her letters sooner from Vicksburg, at a distance of fourteen miles, than from Young's Point, which is only two miles from her residence.

Under the evidence of the case, we think the notice is insufficient. Vicksburg was not the nearest post-office to her residence in June, 1840. 1 Rob. 107. 3 Ibid. 4, 242. *Mead* v. *Bryce*, 6 Ibid. 73. She was in the habit of receiving her letters at other post-offices in her neighborhood, in the parish where she resided in this State, and the notice was addressed to her at Vicksburg, Miss., where she did not reside. This last fact would be sufficient to consider said notice as bad, under the act of 1827, according to the jurisprudence of this court in the case of *Duncan* v. *Sparrow*, 3 Rob. 165, and in divers other cases since decided; and it is clear, that the defendant Mrs. Lawson must be discharged.

But we have come to a different conclusion with regard to her husband and co-defendant. He was no party to the note sued on, but thought proper to interfere in the business, and to assume the payment of the obligation. In a letter written by him to his merchants in New Orleans, about a year after the note was protested, he informed them, that he would send them in a few days a draft of Robert Ford on Maunsel White & Co., for $1200 or $1500; and he adds: "*Mr. Bell, holds a note on William Saunders, with Ann H. P. Noble endorser, which I have agreed to pay out of that draft; when you get the money on the draft, take up that note without the interest.*" This must amount to a positive promise to pay the note, made in favor of a third person who, before it was revoked, had signified his assent to accept it by the institution of this suit, and we think the defendant

Lawson is bound by it. Civ. Code, art. 1896. It is true, it is not shown by positive evidence he was aware of the defect in the protest of the note. But why restrict its payment only to the principal? If the protest had been regular, the interest was to run from its date; the letter was written nearly one year after said protest; it recites that he had previously agreed to pay the note; and the law is well settled, that though it is required that a subsequent promise to pay a bill or note, should be made with full knowledge of the want of due diligence on the part of the holder, affirmative proof of such knowledge is not necessary; it may be inferred from the promise under the attending circumstances. 13 La. 421.

It is, therefore, ordered and decreed, that the judgment appealed from as to Ann H. P. Noble be affirmed, with costs; but as to her husband and co-defendant Lawson, it is ordered and decreed, that said judgment be avoided and reversed, and that the plaintiff do recover of said Lawson, the sum of eight hundred and eight dollars, with legal interest, *per annum*, thereon, from judicial demand until paid, with one-half of the costs in the court below; the costs in this court to be borne, one-half by said plaintiff, and the other half by said defendant Lawson.

Succession of Levi Blakey—Lawrence M. Rutledge, Appellant.

Prescription does not run against the right which an administrator has to claim credit for debts of the succession paid by him. The relation of debtor and creditor does not properly exist between him and the estate, until, after rendering his accounts, a balance has been struck for or against him. Whenever he may file his account, he will be entitled to credit for all sums legally paid for the estate, whatever may be the date of the payments.

Where an administrator has paid claims against a succession which were barred by prescription, or for which, for any other cause, the estate was not liable, the allowance of such payments must be opposed by a written opposition, in the court of the first instance. C. P. 1004. Credits claimed for payments not opposed below, cannot be objected to on appeal, though resisted on the ground that the debts so paid were prescribed. Art. 3427 of the Civil Code, which declares that prescription may be pleaded in every stage of the cause, even after appeal, does not apply to such a case.

Succession of Blakey.

The "bad debts" to be deducted from the amount of the inventory of a succession to ascertain the sum for which an administrator must give security, (C. C. 1041,) and the amount on which his commissions are to be calculated, (C. C. 1062,) are such debts as are prescribed, or due by bankrupts who have surrendered no property to be divided among their creditors. All other debts due to the estate must be taken into consideration in ascertaining the amount of the security, or the sum upon which the administrator is entitled to claim commissions; and as the administrator is bound to use due diligence to collect such debts, he is entitled to charge his commissions on their amount, whether he succeed in collecting them or not.

Appeal from the Court of Probates of Madison, *Downes*, J.

Morphy, J. On the 15th of March, 1843, Nicholson Barnes filed, in the Court of Probates, of the parish of Madison, his account as administrator of the estate of Levi Blakey, which appears to have come into his hands in the year 1834. In a petition which he presented at the same time, he says, that he was ordered to file an account, in the year 1838, by the Probate Court of Concordia, which then had jurisdiction over the estate; that he attended there with most of his vouchers to comply with such order, and waited several days, but that the Judge postponed the matter without any fault on his part; he gives divers explanations in relation to his account, and prays that it may be homologated, and that he and his security be discharged. The usual notices having been given, an opposition was made to the account by Lawrence M. Rutledge, who represents that he is one of the heirs of Levi Blakey, and, as such, interested in the affairs of the succession; he avers that the account rendered by the administrator is incorrect, as it allows to, or claims for, said administrator 2½ per cent on $29,426 13, or $735 52, when $20,054 18, credits due to the estate were returned, and yet remain unadministered upon, and that his commission should be on the inventory, bad debts deducted. He prays that the account be rejected in its present shape, and that Barnes be allowed only the commissions to which he may be legally entitled. The Probate Judge allowed the full amount of the commissions charged in the account, overruled the opposition of Rutledge, and decreed him to pay costs, but neither ordered the homologation of the account, nor the discharge of the administrator and his

sureties. From this judgment, after an unsuccessful motion for a new trial, the opponent, Rutledge, has appealed.

The account filed by the administrator shows the sales made by him, to amount to $6370 62½, and the rights and credits of the estate to $22,533 13, making together $28,903 75½, which would appear to be the whole amount of the estate; and yet he charges his commission on $29,426 13, which he states to be the amount of the inventory; but this document is not in the record. He then credits himself with payments made by him, amounting to $8675 30, as per exhibit marked A, with $20,000, as per exhibit B, and with $54 18½, as per exhibit C.

The appellant has filed in this court a plea of prescription, which must first be disposed of. He avers that each and every demand against the succession, for which the administrator claims credit in his account, is, and was barred by prescription, at the time of making said claims; and moreover, that all and each of said claims were prescribed, and not recoverable against said succession, at the time at which Barnes pretends to have paid them. He concludes by praying, that all the claims be disallowed, and that there be a judgment against the administrator, and in favor of the estate for $29,426 13. How the plea of prescription can be set up, even in the Probate Court, against the items charged in an administrator's account, as paid by him for the estate he administers upon, is not readily or easily understood. He is the legal agent of the heirs or creditors, who can from time to time, call upon him to account for the moneys that may have come into his hands. The debts which he shows that he has paid, are not claims which he has against the estate, and which he is bound to present within any given time. The relation of debtor and creditor does not properly exist between him and the estate, until, after a rendition of his accounts, a balance is struck in his favor, or against him. Whenever he voluntarily files his account, or is compelled to do so, in due course of law, he has a right to credit himself with all the sums he has paid for the estate, whatever may be the date of the payments; and the only question which can arise is, whether such payments have been properly and legally made. If he has paid claims which were not due, because barred by prescription, or if from any other cause,

the creditors or heirs can make opposition to his account, and render him liable for such claims, as having been wrongfully paid, this can be done only in the manner pointed out by law. The heirs or claimants must file their written objections, if they have any, to each item of the account to which they object, or of which they pray for the rejection. Code of Pract. art. 1004. 4 La. 300. The appellant cannot surely be permitted to object, in this court, to payments made by the administrator, when he did not oppose them below. It is true, that art. 3427 of the Civil Code, provides that prescription may be pleaded in every stage of a cause, even on the appeal, but this plea must go to the right to sue; it must be opposed to the main action, not to collateral matters, such as the items charged as paid in an administrator's account. Such matters must form the subject of an opposition to the account when it is filed. We cannot consider the plea of prescription set up by the appellant, in any other light than as an attempt to make, in this court, an opposition to the administrator's account which cannot legally be done.

In relation to the commissions charged by the administrator, and allowed by the Judge, the account shows, that he returned into court 20,054 18, as uncollected, with a statement that an execution obtained on a judgment against John T. Dorsey for $4000, on the first of a series of five notes of said Dorsey, endorsed by Wm. C. Dorsey and J. Fisher, had been returned *nulla bona*, and that the consideration of the four other notes of $4000 each, had failed. No evidence is to be found in the record in support of this statement or allegation; nor is it shown, or even explained, how, or in what manner, the consideration of these large notes failed. Art. 1062, allows to the administrator a commission of two and one-half per cent on the amount of the inventory, deduction being made of bad debts. Art. 1041 provides, that "the security to be given by every administrator, shall be one-fourth beyond the estimated value of the moveables and immoveables and of the credits comprised in the inventory, exclusive of bad debts." By bad debts are understood "those which have been prescribed against, and those due by bankrupts who have surrendered no property to be divided among their creditors." We have in the record, neither the inventory nor the bond of the ad-

ministrator; yet there is enough in it to show that the credits returned do not come within the description of bad debts, as defined by art. 1041. All the credits, good or bad, of an estate, are to be included in the inventory; although, when a bond is to be taken, those bad debts are excluded in fixing its amount, because the administrator can incur no responsibility in relation to them. Arts. 1098, 1041. All other credits, on the contrary, are to be administered upon; that is to say, due diligence must be used to collect them. If the administrator takes no steps whatever, or they are lost to the estate through his neglect, he renders himself responsible on his bond, which covers all the credits not falling within the definition of bad debts, as given by the Code. If his diligence proves ineffectual, he is, in our opinion, entitled to charge his commission on such credits in the same manner as if he had collected them. The steps which he may have taken in relation to the claims due to the estate may have given him more trouble, and put him to more inconvenience, than any other part of his administration; and we see no good reason why he should not receive a compensation. We understand, then, that the bad debts which are to be deducted from the inventory before he charges his commission upon it, are those defined in art. 1041, for which he gives no security, and for which he does not incur the risk of making himself liable. But, in this case, the administrator has shown no diligence whatever to collect the notes which he has returned. The mere statement, that the consideration of these notes had failed, is altogether unsatisfactory, not only in relation to his charge for commission, but also with regard to his liability for these credits, if, through his negligence, they have been lost to the heirs, as is contended by the appellant's counsel. The incomplete state of the record, and the loose manner in which most of the vouchers have been presented, induce us, under the prayer of the opponent for the rejection of the whole account in its present shape, to remand this case, so that no injustice may be done either to the heirs, or to the administrator. We do not feel justified in homologating the account before us, and discharging the administrator and his sureties, when no evidence whatever is offered in support of an item of his account forming more than two-thirds of

the whole estate. Justice, we think, requires that this case should be remanded.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be reversed, and that this case be remanded for further proceedings; the costs of this appeal to be borne by the appellee.

Stockton and *Steele*, for the appellant.

Phillips and *Bemiss*, for the administrator.

LAWRENCE M. RUTLEDGE *v.* NICHOLSON BARNES, Tutor.

A judgment of nonsuit will not support a plea of *res judicata*.

APPEAL from the Court of Probates of Madison, *Downes*, J.

MORPHY, J. The petitioner represents that, on the 11th of February, 1835, the defendant was appointed his tutor, and accepted the trust; that, in 1834, his uncle, Levi Blakey, died intestate, leaving as his heirs his brothers and sisters, (seven in number,) and the petitioner, the only son and representative of his mother, Sarah Rutledge, sister of said Levi Blakey, and that the petitioner's distributive share of the said succession was $3678 31. That, in 1835, another uncle of his died intestate, leaving as his heirs his brothers and sisters, (six in number,) and the petitioner, the representative of Sarah Rutledge, the sister of the deceased, and that the petitioner's distributive share in the succession of David Blakey amounted to $2767 51. That in the year ——, another uncle, Riley W. Blakey, died intestate, leaving as his sole heirs his brothers and sisters, (five in number,) and the petitioner, the sole representative of Sarah, the sister of the deceased, and that the petitioner's distributive share in the succession of Riley W. Blakey was $1074 30. That all this property inherited as aforesaid was received, or ought to have been received, by the defendant, and accounted for to the petitioner, &c. He prays that the defendant be ordered to render an account of his tutorship; and, in default thereof, that judgment, with a privilege on all defendant's property, be rendered against him for

$7520 13, with ten per cent interest thereon, from the 11th of February, 1835, &c.

The defendant, in several successive answers, pleaded the general issue, prescription, and *res judicata;* he further pleaded, that he had already accounted to the court for his administration of the estate of Levi Blakey, and cannot be called upon to account twice for the same; and that, as relates to the succession of David Blakey, the plaintiff cannot stand in judgment to claim any part of it, having divested himself of all right, title, and interest in and to the said succession in favor of Aaron Lilley, &c. There was a judgment below in favor of the plaintiff for $62 50, with a privilege on the defendant's property from the 11th of February, 1835. From this judgment the plaintiff, after attempting, without success, to obtain a new trial, appealed.

In the progress of the trial below, the defendant offered in support of his plea of *res judicata*, a judgment of nonsuit, rendered between the same parties, by the lower court, a few months before. This judgment purports to be based on the ground, that the defendant, Nicholson Barnes, had never been appointed tutor to Lawrence M. Rutledge in regard to the succession of David Blakey, and that he had never accepted, nor had possession of said succession. The plaintiff's counsel opposed the introduction of this judgment, but his opposition was overruled by the Probate Judge, who then decided, that all matters in relation to the estate of David Blakey were *res judicatæ*, and could not be inquired into in this suit. To this opinion, the plaintiff's counsel took a bill of exceptions. The Judge clearly erred in sustaining the plea of *res judicata;* as a judgment of nonsuit forms no basis for such a plea. 6 Mart. N. S. 334. 7 Ib. N. S. 365. 2 La. 429. He seems to have viewed that part of the petitioner's claim relative to David Blakey's succession as a distinct suit, in which he gave a separate judgment, in the same manner as he considered in his judgment of nonsuit, that Nicholson Barnes, although qualified as the plaintiff's tutor, was not his tutor with regard to the said succession. Under this view of the effect of the nonsuit previously pronounced, he excluded, improperly, we think, the evidence offered to show the amount of the succession of David Blakey.

With regard to the main judgment in relation to the plaintiff's demand against his tutor, as an heir of Levi Blakey, it must be reversed, and the case remanded, as the plaintiff's rights in said succession must depend upon the final judgment to be rendered upon the account of the administrator, Nicholson Barnes, which case has this day been remanded. See *Succession of Blakey, supra*, p. 155.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be reversed, the plea of *res judicata* set up by the defendant overruled, and the case remanded to be proceeded in according to law; the appellee to pay the costs of this appeal.

Stockton and *Steele*, for the appellant.

Phillips and *Bemiss*, for the defendant.

PAUL SPOFFORD and others *v.* CHARLES H. PEMBERTON and another.

The jury are judges both of the law and the facts (C. P. 520); and though the judge must abstain from saying any thing about the facts, or even recapitulating them so as to exercise any influence on the decision of the jury, it is his duty to charge them as to the law applicable to the case. C. P. 516, 517.

Damages for an illegal arrest, may be recovered under art. 2294 of the Civil Code, which declares that every man shall be bound to repair any damage done, by his fault, to another.

APPEAL from the District Court of Natchitoches, *King*, J.

SIMON, J. The plaintiffs are appellants from a judgment based upon the verdict of a jury, which makes them liable to pay to one of the defendants (Pemberton) the sum of two thousand and five hundred dollars damages, and which orders that the amount of of the claim due to said plaintiffs by both defendants, be extinguished by compensation with the same sum, out of the damages allowed to Pemberton.

This suit was instituted by attachment, for the recovery of the sum of $708 86, which is the amount of the note sued on, upon the oath of the plaintiffs' counsel, who, in the absence of his clients, who reside in New York, swore to the best of his knowledge and belief, that the amount claimed was justly due, and

that the defendants were on the eve of leaving the State for ever, &c. The attachment was issued, and levied upon six trunks containing articles of clothing, and upon other small articles. This was on the 29th of September, 1842. In the mean time, however, the levy being deemed insufficient, the plaintiffs' counsel filed a supplemental petition, in which, he states that the defendants have fraudulently sent their property out of the State for the purpose of defrauding the plaintiffs out of their just debt, and that they conceal and cover their books of accounts and notes, and refuse to deliver them, and that they are fraudulent debtors within the intent and meaning of the act of the legislature, approved March 28th, 1840, entitled "An act to abolish imprisonment for debt." That one of the defendants (Peck) has left the State never more to return, and that Pemberton is about to abscond from the State forever, and that an arrest is necessary, &c. The oath was again taken by the plaintiffs' counsel, who swore to the best of his knowledge and belief, to the reality and justness of his clients' demand, and to the facts of Peck's having left the State, and of Pemberton & Peck's being fraudulent debtors, adding that the oath was not taken for the purpose of vexing the defendants, &c.

Pemberton was arrested, and having failed to give the necessary bond required in such cases, he was lodged in the jail of the parish of Natchitoches.

The defendants filed their answer, in which they pleaded the general issue; but Pemberton, for separate answer, denied being guilty of any act of fraud as charged by the plaintiffs in their affidavit; he further avers, that no sufficient grounds of imprisonment are set forth in plaintiffs' petition and affidavit, to justify his imprisonment; that the law of 1840 is unconstitutional, so far as it provides for the imprisonment of the party convicted of fraud, as under the constitution of the State and of the United States, the party accused of a crime has a right to a trial under a presentment or information by a Grand Jury; and that said law violates the 18th section of the 6th article of the constitution of the State. He prays for a trial by jury, to be discharged from imprisonment, and for five thousand dollars damages for the false

imprisonment he has suffered in consequence of the plaintiffs' unlawful and oppressive proceedings, &c.

The evidence is voluminous. It tends principally to establish the alleged facts of the defendants' insolvency, and to prove their conduct in the administration of their commercial affairs some time before, and at the time of the institution of this suit; gives a detail of circumstances going to show their intention to leave the State and to settle in the Republic of Texas; attempts to show that, in order to attain their object, a large portion of their goods had already been sent out of the State at the time the attachment in this case was issued; and seems to have been introduced for the purpose of justifying the harsh measure to which the plaintiffs' counsel thought it necessary to resort, in the exercise of his duties towards his clients, in order to secure their claims. On the other hand, the defendants have attempted to explain by testimony, all the different circumstances proven against them; they have endeavored to rebut the charge of fraud on which the writ of arrest was obtained; and, to prove that said charge is unfounded, they introduced witnesses to show the extent of the damages sustained by Pemberton, and to establish the character and good reputation of the latter; but as it is not our object, in the state in which the cause now stands, to investigate and express any opinion on the propriety and necessity of the proceedings which have given rise to this controversy, or upon the sufficiency of the grounds upon which they were based; we shall at once proceed to examine the principal ground upon which the plaintiffs rely, to obtain the reversal of the judgment appealed from.

Our attention has been called to a bill of exceptions taken by the plaintiffs' counsel to the charge of the Judge, *a quo*, to the jury, and to the grounds upon which said counsel vainly attempted to obtain a new trial.

It appears from the bill of exceptions, that the court, in giving its charge to the jury, instructed them that *they were the judges of the constitutionality of the act of the legislature, passed the 28th of March*, 1840, *entitled "An act to abolish imprisonment for debt;"* that the counsel for the plaintiffs then requested the court to instruct the jury, that if they found the act unconstitutional, they could not under the act, assess damages against the

plaintiffs, upon the ground that, if the law was void in itself, the jury could not act under it. But the court refused to give the instruction, and instructed the jury that although the law might be unconstitutional, still they could assess damages against the plaintiffs under the 2294th article of the Civil Code; and, to the opinion of the court, refusing to give the instruction asked for, and giving the above instructions, the plaintiffs took a bill of exceptions.

The second ground upon which the plaintiffs applied for a new trial, is, that the court misdirected the jury in charging them that they were the proper judges of the constitutionality, or unconstitutionality, of the act of the legislature passed the 28th of March, 1840, under which the fraud in the petition is charged.

We think the charge of the court was insufficient on the legal question submitted to the consideration of the jury. It is true, the jury were judges of both the law and the fact, and that, being in all cases, at liberty to act on both questions, they may, in making their verdict, express their opinion on the law and the facts of the case. Code of Pract. art. 520; 10 La. 81. But this is not to be understood, as leaving to the jury the exclusive right of pronouncing on the application of the law, without having been previously instructed by the Judge, on what the latter conceives to be the law which governs the rights of the parties, and without knowing that law. Indeed, article 516 of the Code of Practice, appears to contemplate that the Judge, in his charge, shall give to the jury, *a knowledge of the laws applicable to the cause submitted to them.* This the Judge is bound to do, particularly in the case of a remedial law; as otherwise, the jury, who are not composed of lawyers, would often be led astray, or would remain in the dark, as to the application of law questions, to the facts which it is peculiarly within their province to find. Art. 517, which is in these words, " If, when the Judge shall have finished his charge to the jury, one of the parties believes *that the Judge has mistaken the law, which he has stated to the jury, or in the application which he has made of it, he may require the Judge to give his opinion in writing, touching this matter*, and on his refusal, he may take an exception, &c.," clearly declares, that the Judge ought to give his opinion on the law to the jury,

and that either party dissatisfied with it, may avail himself of his objections to it by a bill of exceptions. Here, the opinion of the court, on the constitutionality or unconstitutionality of the law of 1840, upon which the case turned under the pleadings, was not expressed; nay, it was left entirely to the decision of the jury, as the proper judges thereof, without any instructions or reasons under which they could act in the application of that law. Not knowing the opinion of the court upon this subject, neither of the parties had any opportunity of expressing his dissatisfaction, or of making his objections to the correctness of the charge; and nothing shows the views, which the jury may have taken, of the important constitutional question upon which the Judge thought proper to abstain from giving them his instructions. District Judges, when presiding over a jury, are not mere automata without power or authority; they have a very important duty to fulfil, which is clearly pointed out by law; and although they must abstain from saying any thing about the facts, or from even recapitulating them, so as to exercise any influence on their decision in this respect; (Code of Pract. art. 516;) they should not let the jury retire without their being fully impressed with a proper application of the law to those facts.

With this view of the duties of Judges of inferior jurisdiction, in the cases submitted to juries over which they preside, this case must be remanded for a new trial, with instructions to the Judge, *a quo*, to express his views or opinions to the jury on the constitutionality or unconstitutionality of the act of the legislature, passed on the 28th of March, 1840, entitled "An act to abolish imprisonment for debt," which seems to be one of the principal matters in issue between the parties; and to instruct them accordingly.

With regard to that part of the Judge's charge, complained of by the appellant's counsel, and which goes to lay before the jury that principle so often acted upon, that, "every act whatever of man, that causes damage to another, obliges him by whose fault it happened to repair it," as recognized by the 2294th article of our Code; on the supposition that they would find that the law of 1840 is unconstitutional, we are unable to say that it was illegal and improper. It constitutes one of those broad principles or

rules of equity, which juries should never lose sight of, in the adjustment of the rights of their fellow citizens.

It is, therefore, ordered and decreed, that the judgment appealed from be annulled, and reversed, the verdict set aside, and that this case be remanded to the lower court for a new trial, with instructions to the Judge, *a quo*, to charge the jury according to the rules above recognized; the appellee paying the costs in this court.

Roysdon, for the appellants.

Tuomey, for the defendants.

FELIX MARCOTTE *v.* LUCIEN D. COCO.

In the interpretation of contracts the common intent of the parties, rather than the literal sense of the terms, should be sought; and where the intent is doubtful, the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation. C. C. 1951.

Parol evidence is admissible to show in what manner a contract for the sale of lands has been executed by the parties, and how far the possession has conformed to the act of sale.

APPEAL from the District Court of Avoyelles, *Boyce*, J.

Waddill, for the appellant.

T. H. and *W. B. Lewis*, for the intervenor, Durand.

Taylor and *Swayze*, for the defendant.

Cushman, for the warrantor.

BULLARD, J. The plaintiff Marcotte asserts title to a tract of land, which he describes as fronting on the bayou Rouge, and containing sixty-seven superficial acres and one-eighth, having a front on the bayou of four *arpents*, more or less, as shall be necessary to complete that quantity upon a survey, by a depth from the front on the bayou, until it shall strike the line which separates the sections Four and Nine. He alleges, that he claims title under Valerien Baron, who purchased from George Baron, and the latter from Valery Bordelon. The defendant Coco answers, that he has a valid and legal title, which he acquired by purchase from the same Valery Bordelon, in 1838. That he has made exten-

sive and valuable improvements, of the value of $5000. That he purchased the tract on account of its supposed front on the bayou Rouge. That Bordelon, the vendor, at the time of the sale, pointed out the boundaries under which the respondent has ever since possessed. He calls in his warrantor, and claims for his improvements; and that a note given for a part of the price yet unpaid, shall be given up and cancelled.

Valery Bordelon, the common vendor and warrantor of both the parties, alleges in his answer, that the defendant Coco has a legal and valid title to all the land in his possession, having derived the same from the respondent, who admits he sold to the defendant. He further says, that he, and his vendee, the defendant, have actually possessed by metes and bounds well ascertained and known, by a valid title translative of property, for the last sixteen years; and he pleads for himself and his vendee the prescription of ten years. He further alleges, that the suit is collusive between the original parties. That the plaintiff is the pliant tool of the defendant in instituting this suit, for the purpose of making a show of being disturbed in his possession, in order to obtain a suspension of the payment of a large sum still due for the price. He further says, that if the plaintiff has any act of sale for any part of the land occupied by the defendant, the same was executed in error and by mistake. He admits that, in 1827, he sold to George Baron a tract of land, situated on the bayou Rouge, having a front of four *arpents* more or less, to go back to the subdivisional line dividing section nine, the said line dividing the land above from lands of Russell Milligan, and below from lands of Valery Bordelon, *père*, to be run out by a survey to be afterwards made; and avers that said contract of sale was from boundary to boundary. That in pursuance of said contract, and at the special instance and request of the parties, James McCauley, a deputy surveyor of the United States, did proceed, in presence of both parties, to fix the boundaries fronting on the bayou, and going back to the said subdivisional line; that the respondent delivered, and the said George Baron received possession of said land, supposed to contain about sixty-seven acres, according to the metes and bounds thus established; and that the said George Baron, and those claiming under him, and particularly the plain-

tiff, who holds under Valerien Baron, purchased in reference to said boundaries, and that possession of both tracts has been held according to said boundaries.

Pendente lite, the right of the original plaintiff to the land in controversy was sold at sheriff's sale, and purchased by Durand, who made himself a party plaintiff, by intervention.

Upon these issues the parties went to trial, and a judgment having been rendered for the defendant, the plaintiff appealed.

It is proper to premise, that if the plaintiff succeeds in the present action, he will have a front of about twenty acres instead of four, *more or less*, by extending the lines back only to the division line, which separates sections Four and Nine. This would give to the expression, *more or less*, a wider latitude than we have ever heard contended for. It is further to be remarked, that the parties in the act of sale from Bordelon to Baron, contemplated an actual survey, and that there is an *apostille* to the act, approved by the parties before signature, in these words: "*est borné par en haut par Valerien Laborde, et par en bas par le vendeur*" &c. The land afterwards sold by Bordelon to Coco, was then in the possession of the former, who owned a much larger tract extending considerably beyond the line which separates No. 4 from No. 9. The whole deed must be taken together; and it leaves the meaning of the parties ambiguous as to the back line, and appears to repel the idea that so wide a front was intended to be sold, as is now contended for. If, however, Bordelon had not been the owner of the land back of the line claimed as the real boundary, the purchaser might have demanded his complement, with a sufficient front to make it up to him.

The parol evidence shows, that shortly after the date of the sale, in 1827, to Baron, McCauley, an authorized surveyor, proceeded, in presence of the parties, to lay off the land sold. He testifies that he began at a point on the bayou Rouge, where the dividing line between Bordelon's land, and that of Laborde, strikes the bayou, and ran down four *arpents*, and then ran back until he found the quantity of sixty-seven acres. After this, Bordelon put up a fence on the front portion of the line, which has existed ever since, as far back as the improvements go. Baron cleared back of the line separating No. 4 from No. 9. Bordelon and

Coco, have continued to cultivate below the line, ever since 1827, and up to the line. Posts were planted on these lines in presence of the parties, which yet remain. Baron also put up a fence in conformity to this survey. These posts were found when the land was surveyed under the order of court in this case.

The testimony of McCauley was objected to by the plaintiff's counsel, on the ground, that parol testimony cannot be received for the purpose of controlling the express conditions of the deed; and that no parol evidence can be received of what took place between Bordelon and Baron, before the passage and execution of the deed. But the evidence was admitted, and we think properly; not only was such a survey contemplated by the parties, but it was a tradition of the thing sold, as the parties understood the contract at the time. They have continued to hold ever since that period in conformity to the survey then made.

Marcotte having been interrogated upon facts and articles, admits among other things, that before he purchased he went to visit the land; that it was designated to him to be bounded above by Milligan and Apollinaire Bordelon; in the rear by posts set in the ground, on the front by a fence, and below by the land of Lucien Coco. These answers were not, perhaps, legal evidence against Durand, the intervenor, but they were not liable to the objection made by the intervenor that they constituted parol evidence, and tended to contradict, or explain, the written deed. Their obvious purpose was to prove, that Marcotte knew how his vendor possessed in relation to his neighbors, and what land was really intended to be sold. Durand acquired no greater right than Marcotte had, especially as he purchased *pendente lite.*

Courts of justice are bound, in the interpretation of contracts, to seek the common intent of the parties, rather than to adhere to the literal sense of the terms. "When the intent of the parties is doubtful," says the Code, "the construction put upon it by the manner in which it has been executed by both, or by one, with the express or implied assent of the other, furnishes a rule for its interpretation." Art. 1951. Parol evidence is clearly admissible to show in what manner a contract has been executed by the parties, and how far in a contract for the sale of land the posses-

sion has been conformable to the deed. In the case now before us, the tradition was made by a survey, and by planting posts on the lines as was agreed upon by the parties. The land as delivered was bounded on the front, on one side by Laborde, now Milligan, and below by the vendor, and on that line a fence, having four *arpents* front on the bayou Rouge, in literal conformity to the terms of the contract. Since 1827, all parties have acquiesced in that state of things. The contract was executed by the tradition and acceptance of the thing sold, as understood by the parties at the time; and, in our opinion, this practical interpretation by the parties themselves, ought not to be disturbed.

Judgment affirmed.

JOHN S. EDWARDS, Administrator of the Succession of John Butler, deceased, *v.* JAMES BURROUGHS.

Where the evidence is contradictory, and its effect depends in a great degree upon the credibility of the witnesses, a jury are the best judges of the weight to which it is entitled; and their verdict will not be disturbed, unless manifestly wrong.

APPEAL from the District Court of Avoyelles, *Campbell*, J.

Taylor and *Swayze*, for the plaintiff.

Cushman, for the appellant.

BULLARD, J. The plaintiff sues as administrator of the estate of Butler, for the price of a slave, purchased by the defendant, at the probate sale of the property of the estate. The defence is, that the slave was affected with redhibitory vices and defects, and that his services were so much interrupted thereby, that the defendant would not have purchased, had he known of their existence. He prays that the sale may be cancelled. The cause was submitted to a jury, who by their verdict, reduced the price from $920, to $500; and that verdict being followed by a judgment, the defendant appealed.

It appears in evidence, that the sale took place in the spring of 1840, and the slave died in the spring of 1841. In the meantime, it does not appear that the defendant made any complaint, or that

he demanded the rescission of the sale. On the contrary, he offered him for sale, and refused to take less for him than he had given at the probate sale.

We have attentively considered all the evidence in the record, upon which the jury acted. It is so difficult to reconcile, and so balanced, and the effect it would produce upon the mind depending so much upon the credibility of the witnesses, that, if the jury had come to the conclusion, that the sale ought to be cancelled, we should, perhaps, not have thought it our duty to disturb the verdict. In a case like the present, the jury is more competent than we are to estimate the value of the evidence. We are not satisfied that the judgment is so manifestly wrong as to authorize our interference.

Judgment affirmed.

SARAH W. CLEVELAND, Tutrix of her Minor Child, Waddy Thompson Cleveland, *v.* JOHN P. SPROWL, Administrator of the Succession of Harvey Cleveland, deceased.

No tutorship exists during the marriage over the children born of it. C. C. 234. While the marriage exists, the father is the administrator of the estate of his minor children, and he is accountable for the property and revenues of the estate, the use of which he is not entitled to by law, and for the property only of such as the law gives him the usufruct of: his administration ceasing at the majority or emancipation of the children. C. C. 267, 239, 240. But the child has no legal mortgage or privilege on the property of the father as a security for his faithful administration during the marriage. C. C. 552, 553, 555, 3280 to 3288.

APPEAL from the Court of Probates of Natchitoches, *Greneaux*, J.

J. Taylor, for the appellant.

J. B. and *C. E. Carr*, for the defendant.

SIMON, J. The plaintiff sues as natural tutrix of her minor son, and seeks to obtain judgment against the succession of her late husband, administered by the defendant as an insolvent estate, for the sum of seventeen hundred dollars, which, she states, is the amount of the sales of certain blooded horses which

were donated to her said son by his maternal uncle, during the lifetime of his father, and which were sold by his said father for his benefit, and as property belonging to the said minor for the sum aforesaid; so that, at the time of his death, her late husband was justly indebted to his said minor son in the amount aforesaid, which, she prays, may be ordered to be placed on the tableau of distribution of the estate, as a claim secured by legal mortgage and privilege on all the property belonging thereto, at the time of her husband's death, from the time the money was by him received, &c.

The defendant pleaded the general issue. Judgment was rendered below in favor of the plaintiff for the amount sued for, but refusing to allow her the right of mortgage prayed for in her petition, and she took this appeal.

The claim set up by the plaintiff for her minor son has been well established; and the only question which this case presents is, whether the minor had a legal mortgage on the property of his father, during the marriage, to secure the payment of the amount due him at the age of majority?

By art. 3280 of the Civil Code, it is provided, that *no legal mortgage shall exist, except in the cases determined by the said Code;* and by art. 3281, the rights and credits on which a legal mortgage is founded, are those *enumerated in the articles following*, the first of which, art. 3283, says that, "Minors, persons interdicted, and absentees, have a legal mortgage on the property of their tutors and curators, as a security for their administration, from the day of their appointment, until the liquidation and settlement of their final account." See, also, art. 354. But among the mortgages enumerated, we find no such legal mortgage as the one contended for by the appellant.

Now, it is well known, that no tutorship exists, during the marriage, over the children issued from it, but that a child remains under the authority of his father and mother until his majority or emancipation. Civ. Code, art. 234. The father is, during the marriage, administrator of the estate of his minor children; he is accountable both for the property and revenues of the estates, the use of which he is not entitled to by law, and for the property only of the estates, the usufruct of which the law gives him;

and such administration ceases at the time of the majority, or emancipation of the children. Art. 267. The natural tutorship only takes place after the dissolution of the marriage, by the death of either of the spouses, and belongs of right to the surviving one. Art. 268. Thus it is clear, that the legal mortgage resulting from the tutorship, is not applicable to the administration of the minor's property, given by law to the father, during the marriage. He is not a tutor; his duties and responsibilities are very different; and the law does not appear to have intended, that while the minor's estate remains under his father's administration during the marriage, his child should have a legal mortgage upon his father's property, as a security for the said administration. He is accountable, it is true, for his children's property and revenues; but art. 239 says, that fathers and mothers shall have, during the marriage, the enjoyment of the estate of their children; and art. 240 informs us, that the obligations resulting from this enjoyment shall be *the same obligations to which usufructuaries are subjected*, and to support, to maintain, and to educate their children according to their situation in life. Now, on referring to art. 551, we find that a usufructuary must give security that he will faithfully fulfil all the obligations imposed on him by law; (art. 522;) that, in place of such security, he may give a special mortgage on his real property; (art. 555;) but art. 553 provides, that "*Neither the father nor mother having the legal usufruct of the estate of their children, is required to give this security*," and they are consequently not bound to give a special mortgage.

We must, therefore, conclude, that our law allows no mortgage on the property of the father, as a security for his faithful administration of his children's estate during the marriage; that the father and mother have the enjoyment of their children's estate, without being bound to furnish any security; and that the Judge, *a quo*, did not err in refusing to recognize the mortgage rights prayed for by the appellant. It may be a hard case; and we should perhaps, as men, be disposed to sympathize with the feelings expressed by one of the appellant's counsel in his brief, and deplore the situation of a poor orphan, whose estate has been squandered by his father, and who is left remediless

after the latter's death. But such is the law. As Judges we are bound to obey it; and we do not feel authorized "to strain it a little," as the counsel suggests, even were it for the sake of remedial justice.

Judgment affirmed.

THE NEW ORLEANS CANAL AND BANKING COMPANY *v.* EDMUND L. BRIGGS.

Where an endorser receives his letters and papers from two post-offices, a notice of protest directed to either, will be sufficient.

APPEAL from the District Court of Avoyelles, *Campbell*, J.

MORPHY, J. This suit is brought against E. L. Briggs as the second endorser of a note for $1500, drawn by Lewis Bordelon to the order of, and endorsed by D. T. Orr, and made payable twelve months after its date, at the office of discount and deposit of the New Orleans Canal and Banking Company, at Alexandria. The defendant pleaded the general issue, and had a judgment in his favor, from which the plaintiffs have appealed.

The record shows, that the note sued on, which bears date the 10th of January, 1842, was duly protested on the 13th of January, 1843, after presentment and demand at the place of payment mentioned in the body of the instrument; and that, on the same day, the notary who made the protest notified E. L. Briggs thereof, by depositing a notice for him in the post-office at Alexandria, addressed to him at his domicil near Mansura, parish of Avoyelles, Louisiana. It is shown, that there are two post-offices in the parish of Avoyelles, one at Mansura, and one at Bordeau.

There is some variance of opinion among the witnesses, as to which of these offices is the nearest to the residence of Briggs, but the difference of distance between the two, if there be any, is but slight; and in this case altogether immaterial, as it appears that he received letters and papers from both. It is even shown, that he received most of his letters from the Mansura office in 1843; and his brother testifies, that there is more travel by the way of the Mansura office, and that he would, if

writing to E. L. Briggs, address him at Mansura, as he received most of his letters at that office. Under this evidence, we are at a loss to understand how the endorser could have been released from his liability below. In the cases of *The New Orleans and Carrollton Railroad Company* v. *Robert*, (9 Rob. 130,) in *Mead* v. *Carnal and another*, (6 Rob. 73,) and in that of *Follien et al.* v. *Dupré et al.*, (11 Rob. 454,) this court held, that the sufficiency of a notice to an endorser must not be made to depend on a slight difference in the admeasurement of the distance of two post-offices located in his neighborhood, and that the notice is good, if sent to the office where it is probable he will receive it earliest. In the present case, a notice sent to either office would perhaps have been sufficient; but that sent to Mansura is certainly good, as it is shown that the defendant received most of his papers there.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and that the plaintiffs recover of the defendant E. L. Briggs, the sum of fifteen hundred dollars, with interest at the rate of eight per cent, *per annum*, from the 13th of January, 1843, until paid, with five dollars cost of protest, and the costs of suit in both courts.

Hyams, for the appellants.

Edelen, for the defendant.

ACHILLE RIVARDE and others *v.* OLYMPHE JOFFRION.

APPEAL from the District Court of Avoyelles, *Boyce*, J.

SIMON, J. The parties in this case, having filed their written agreement by which the appellee consents to abandon altogether his claim for ten per cent damages, and the appellant, that the judgment of the court, *a qua*, be confirmed:

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed, with costs.

Waddill, for the plaintiffs.

Bryce, for the appellant.

JOHN F. JOHNSON *v.* WILLIAM BAILEY.

Damages will not be allowed for the delay occasioned by an appeal, unless prayed for by the appellee.

APPEAL from the District Court of Carroll, *Willson*, J.

T. N. Peirce, for the plaintiff.

Selby, for the appellant.

SIMON, J. The defendant is appellant from a judgment which condemns him to pay the amount of the note upon which he is sued. In his answer he pleads, that the plaintiff is not the owner of said note; that it belongs to another person who has notified him not to pay it to the plaintiff, and that he has a right to plead this defence under the laws of Mississippi, where the note was executed, and where the parties reside.

It was shown, however, on the trial below, that, although it is true the payee of the note sued on, once notified the maker not to pay its amount to the plaintiff, as the latter had not complied with the terms of the transfer, said payee, about nine months afterwards, withdrew his notice, and recognized in writing the right of said plaintiff to the ownership of said note. The note sued on, which is found in the record, appears to have been regularly endorsed by the payee, the signature of the latter has been proved, and we are unable to see any reason why the judgment appealed from should not be affirmed.

The statement made by the appellant's counsel in his brief, that the note sued on was not filed in the suit, that it was not offered in evidence, and that there is no testimony upon which to base the judgment, is incorrect. The note is included in the statement of facts under the letter A.; it is therein identified with the testimony of the witness who was called to prove the signature of the endorser; said statement of facts is certified by the District Judge, as containing all the testimony taken down by him, by consent of the parties on the trial below; and the clerk's certificate shows that the record is complete.

This appeal was clearly taken for delay, and we think the appellant should have been bound to pay the appellee the maxi-

mum of the damages allowed by law in such cases, had they been prayed for by the latter.

Judgment affirmed.

SUCCESSION OF CHARLES F. STAFFORD.—A. J. FULLER, Administratrix, Appellant.

A stipulation in a note given for the price of property sold on a credit, that, if not paid at maturity, the amount for which the note was given shall bear the highest conventional interest from the date of the note till paid, is usurious.

The amount claimed, and not that allowed by the judgment of the court of the first instance, determines the right to appeal.

APPEAL from the Court of Probates of Avoyelles, *Baillio*, J.

MORPHY, J. James Chambers was the holder of a note for $675, drawn by the deceased, Charles F. Stafford, on the 1st of February, 1836, and payable on the 1st of February, 1838, with interest, at ten per cent per annum, from the date of the note, if not punctually paid at maturity. At a meeting of the creditors of the estate, held on the 9th of August, 1841, he appeared and claimed, that a slave named Tom, in payment for whom a note was given, and who was mortgaged to secure its payment, should be sold for cash. The sale was made only on the 7th of February, 1843, and the slave was bought by Chambers for $1100. The administratrix of the estate having filed her *tableau* of distribution previously to the day of this sale, Chambers, whose claim was not mentioned thereon, filed an opposition, praying to be placed upon it, so that he might be paid out of the general fund of the estate as an ordinary creditor, in case the slave mortgaged to him did not bring an amount sufficient to satisfy his whole claim, which, with interest, at ten per cent up to the 7th of February, 1843, would amount to $1153 36. There was a judgment below in favor of the opponent for $53 36, as an ordinary debt due to him, over and above the proceeds of the sale of the mortgaged slave; and from this judgment the administratrix appealed.

The appellant's counsel has urged, that the opposition of Cham-

bers should be dismissed, and the balance of $53 36, which he claims, disallowed, as, by receiving $1100, the price of the slave Tom, he has been overpaid; that his claim consists of back interest, which, under the decisions of this court in *Griffin* v. *His Creditors*, (6 Rob. 216,) and in *Stone* v. *Tew and another*, (9 Rob. 194,) has been declared to be illegal and usurious. The doctrine settled in these cases has not been impugned by the appellee's counsel, but he contends, that the homologation of the proceedings of the creditors before the notary, which was pronounced at the prayer of the administratrix on the 6th of September, 1841, should bar her from appealing. The proceedings had before the notary, and the judgment pronounced upon them, have no relation whatever to the matter in controversy in the present case. They relate entirely to the sale of the property, and have nothing to do with the legal rights and claims of the creditors, which must be settled on the *tableau* of distribution subsequently filed. As to the motion to dismiss the appeal, on the ground that the sum in dispute is below the jurisdiction of this court, it is sufficient to say, that the appellee claimed in his opposition, to be placed on the *tableau* for the whole amount of his debt, not knowing then what would be the price brought by the slave, who was to be sold a few days after. It is the amount claimed, and not that allowed by the judgment below, which gives us jurisdiction.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be reversed, so far as it relates to the $53 86, allowed to the opponent, Chambers; and that his opposition be dismissed, with costs in both courts.

Edelen, for the appellant.

Hyams, for the opponent.

BENJAMIN L. OLIVER and others, Heirs of Thomas F. Oliver, deceased, *v.* ARCHIBALD P. WILLIAMS.

Where the plaintiff in a petitory action, appeals from a judgment rendered in favor of the defendant, third persons called in warranty, must be cited as appellees, or the appeal will be dismissed. *Per Curiam:* One who asks relief at our hands, must bring before us all the parties interested in maintaining the judgment which he seeks to have amended or reversed.

APPEAL from the District Court of Rapides, *King*, J.

J. F. Brent, for the appellants.

Dunbar and *Hyams*, for the defendant.

MORPHY, J. In this case, which is a petitory action, in which the defendant called in warranty Horatio S. Sprigg and Thomas Hooper, a motion was made to dismiss the appeal, on the ground, that the warrantors have not been made parties, and cited to appear in this court. This motion must prevail. We have repeatedly held, that the party who seeks relief at our hands, must bring before us all the parties to the judgment which he seeks to have reversed or amended, and which they have an interest to maintain. 5 Rob. 224. 3 Rob. 61. 12 La. 474. We do not think that the appellants' counsel can obtain any relief under the act of the 20th of March, 1839, to which he has called our attention. It provides, that no appeal shall be dismissed on account of any irregularity in the citation or service thereof, whenever such irregularity is not to be imputed to the appellant. In the present case, no citation of appeal has ever issued, nor has any ever been prayed for, as to the warrantors. The petition of appeal asked for a citation only as to the defendant Williams, and the appeal bond is given only to him. But even were we to allow time to cite the warrantors, they could no longer be brought in, as the judgment complained of, was rendered on the 29th of May, 1843 and has become final as to them. 14 La. 293. 16 La. 50. Code of Pract. art. 593.

Appeal dismissed.

THE COMMERCIAL BANK OF NATCHEZ, for the use of the Mechanics and Traders Bank of New Orleans, *v.* JESSE GUICE.

Interrogatories propounded to a bank as a party to an action, should be answered by the president of the bank; answers by the cashier alone, are insufficient.

APPEAL by defendant, from a judgment rendered against him by the District Court of Concordia, *Willson*, J.

BULLARD, J. The plaintiffs sue to recover, for the use of the Mechanics and Traders Bank of New Orleans, the balance due upon a promissory note, made payable at their banking house in Natchez.

The defendant admits his signature, but avers in his answer, that the only value received for said note was post-notes or bills of credit of the Commercial Bank, payable twelve months after date. That for the purpose of discharging said note, he delivered to the plaintiffs eighty-nine bales of cotton, of sufficient value to discharge said note and interest; and that the proceeds would have been sufficient to pay the whole amount, had it not been for the illegal conduct of the Bank, in forcing a sale thereof. He avers, that the Bank has never fairly accounted to him for the proceeds of the cotton, and that the contract was illegal and repugnant to the constitution of the United States, the laws of Mississippi, and the charter of the Bank.

The defendant interrogated the plaintiffs upon facts and articles, and particularly, whether the consideration of the note was not a loan of post-notes as alleged in the answer. These interrogatories appear to have been answered by the cashier of the Bank. But it is objected that they ought to have been answered by the president, and that they should be taken *pro confessis*. We are not prepared to say, that the answer by the cashier is regular; but it only follows, so far as it concerns the consideration of the note, that it was given for a loan of post-notes, and the defendant is estopped from denying that fact, by alleging it in his answer as the ground of his defence.

The record contains a statute of the state of Mississippi, which authorizes the issuing of post-notes by the banks of that State, having not more than thirteen months to run, and bearing

interest to be expressed on their face, at five per cent. It authorizes the banks to loan them at a rate of interest not exceeding nine per cent, and the act declares, "that no set off shall be allowed, nor shall any defence be made of any failure of consideration, or want of consideration arising between the parties to any promissory note which may be discounted at any of said banks, and for which said post-notes shall have been paid out, except such defence shall show such note void in its inception; provided however, that the note so discounted shall be expressly payable at the bank, discounting the same." Howard & Hutchinson's Laws of Miss. 218.

The note itself shows that the loan was an advance upon cotton, and there is a credit entered upon it for the proceeds of cotton sold; but if the answers to the interrogatories be rejected, there is no evidence to show to what amount the defendant is entitled as a credit, or that he ever assented to the credit as given on the note. Being of opinion, therefore, that the court erred in admitting the answer to interrogatories on facts and articles sworn to by the cashier alone, and there being no sufficient evidence without legal answers thereto, justice requires, that the case should be remanded for a new trial.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and the verdict be set aside, and that the case be remanded for a new trial, with directions to the Judge not to admit in evidence the answers to interrogatories on facts and articles sworn to by the cashier alone; and that the appellees pay the costs of this appeal.

F. H. and *T. P. Farrar*, for the plaintiffs.

Frost, for the appellant.

CHARLES A. JACOBS *v.* ARCHIBALD P. WILLIAMS.

An acknowledgment of the debt by the maker of a note does not interrupt prescription as to the endorser. They are not debtors *in solido* in the meaning of arts. 2092, 3517 of the Civil Code, which declare that a suit brought against one of the debtors *in solido*, or his acknowledgment of the debt, interrupts prescription as to the rest. *Per Curiam:* The maker and endorser do not bind themselves at the same time, or by the same contract, but by different and successive contracts, without any privity or reciprocity. Debtors *in solido* are, among themselves, liable each only for his portion (C. C. 2099); if one pays the whole debt, he can claim from each of the rest only his portion; and if one be insolvent, his portion must be divided among the solvent obligors. C. C. 2100. *Aliter*, as to the maker and endorsers of a note or bill; each endorsement is a distinct contract; if payment be made by the maker, or first endorser, neither can claim any thing from subsequent endorsers; while, if it be the last endorser who pays, he may claim the whole amount from any previous endorser or the maker; and each endorser has the same right against every previous endorser and the maker.

An accommodation endorser of a note is not a surety in the meaning of art. 3518 of the Civil Code, which declares, that a citation served on the principal debtor, or his acknowledgment, interrupts prescription as to the surety. *Per Curiam:* The suretyship between an accommodation endorser and the maker of a note, exists only as between themselves; as to the holder, their liability depends on the rules applicable to negotiable instruments in general.

APPEAL from the District Court of Rapides, *Campbell*, J.

Brent and *O. N. Ogden*, for the appellant.

Dunbar, *Hyams*, and *Elgee*, for the defendant.

MORPHY, J. This action is brought to recover a balance of $6807 40, alleged to be due by the defendant as the endorser of a protested note for $8922 83, drawn to his order, by James D. Spurlock. The defence set up is, that the plaintiff, having acquired the note sued on, after protest, holds it subject to all the equities and defences that might have been set up against the original holders, Lambeth and Thompson; that the latter, long before the maturity of this note, and for a valuable consideration, gave time to the maker, James D. Spurlock, without the defendant's knowledge and consent, whereby he was discharged from all liability. The defendant further pleaded the prescription of five years. There was a judgment below in his favor, and the plaintiff appealed.

The defence mainly insisted upon in this court is that of prescription. The note sued on was protested on the 18th of January, 1836, and service of citation in this suit, was made on the defendant only on the 17th of April, 1841. The plaintiff's right to sue is, then, clearly barred, unless, as is contended by his counsel, there has been an interruption of the prescription. To prove such interruption, he has called our attention to several accounts current to be found in the record, between Lambeth and Thompson, and the maker, James D. Spurlock. In one of them, which was approved and signed by the latter on the 27th of February, 1841, a credit on this note appears to have been given to him on the 16th of March, 1840, which reduced the debt to the sum now claimed. This is relied on as proving a payment made by the maker, from which it is said that there results such an acknowledgment of the debt as interrupts prescription, not only as to Spurlock, but also as to the defendant, who is bound, *in solido*, with him as endorser; and we have been referred to those articles of our Code which provide, that a suit brought against one of several debtors *in solido*, or his acknowledgment of the debt, interrupts prescription as to all of them. Arts. 2092, 3517. Admitting that the consent given by Spurlock to the imputation made in this account current binds him, and must operate as an interruption of the prescription which was running on this note, this act of his cannot bar the defendant's right to set up this plea, unless it be true that the maker and endorsers of a note are debtors, *in solido*, in the sense and meaning of the articles of the Code relied on. This, we are by no means prepared to admit. The well known maxim of the civil law, *a persona ad personam non fit interruptio active nec passive*, is not without its exceptions; but such exceptions should not be extended to cases not coming clearly within their purview and spirit. One of the several classes of persons whose acts are binding on each other, in relation to prescription, are debtors *in solido;* but there is a vast difference between the solidarity of persons who bind themselves, *in solido*, under the provisions of the Code, and that which arises under the commercial law between the drawers and endorsers of notes and bills of exchange. We understand that solidarity exists in the meaning

of the Code, when several persons bind themselves towards another for the same sum, at the same time, and in the same contract; and so obligate themselves, that each may be compelled to pay the whole debt, and that payment made by one of them exonerates the others towards the creditor; and the obligation thus contracted is one, *in solido*, although one of the debtors be obliged differently from the others to the payment of one and the same thing; as, if the one be but conditionally bound, while the engagement of the others is pure and simple, or if the one is allowed a term which is not granted to the others. Civ. Code, arts. 2072, 2077, 2086, 2087. Such were, also, the requisites of the Roman law to create among debtors a perfect solidarity. 6 Toullier, No. 723. 2 Duranton on Obligations, No. 547. Pothier on Oblig. No. 263. In giving his views as to the reason why the Roman law gave to the acknowledgment of one of several debtors *in solido*, the effect of interrupting prescription as to the others, Toullier says, that it is to be found in the very nature of the obligation, and is clearly deducible from the law itself of Justinian, which declares, that it is just, *humanum*, that the acknowledgment of a debt created by one and the same contract, *uno eodemque contractu*, should bind equally all the debtors to pay such debt. When, says this author, several debtors bind themselves for the same debt, in the same contract, they create among themselves a kind of partnership as regards that debt; they mutually charge each other by a tacit, yet real proxy to pay it. The debtor, then, who alone pays the whole debt, acts, not only for himself, but also for those whose share he pays; and, in like manner, if he alone acknowledge the debt, he does so, not only in his own name, but also in that of his co-debtors, by virtue of their tacit proxy; and the interruption of prescription which results from such acknowledgment must exist and have its effect as to all of them. 6 Toullier, No. 729. From these remarks of the learned jurist, it is easy to perceive how different is the solidarity which exists between the drawer and endorsers of a promissory note, and how inapplicable to them are the provisions of our Code in relation to debtors *in solido*. Instead of being bound in the same contract and at the same time, the obligation of each of them arises from different and succes-

sive contracts, without any privity or reciprocity between them. It is true, that when the note is protested, and the several endorsers are duly notified of such protest, they become each bound for the whole amount of the note towards the holder. This indebtedness of each of them for the whole debt creates, to be sure, a kind of imperfect solidarity between them, but it is not that contemplated by the Code. The obligation contracted *in solido*, says art. 2099, is, of right, divided amongst the debtors, who, between themselves, are liable each only for his part and portion. If one of the co-debtors, *in solido*, pay the whole debt, he can claim from the others no more than the part and portion of each. If one of them be insolvent, the loss occasioned by his insolvency must be equally shared amongst all the other solvent co-debtors, and him who has made the payment. Art. 2100. From these, and other provisions of the Code, it is apparent that the rights and relative position of debtors, *in solido*, therein spoken of, are widely different from those of the maker and endorsers of a promissory note or bill of exchange. Each endorsement is a distinct contract; it is a transfer of the amount due by the maker, for which each endorser or transferror becomes successively bound towards the holder, if duly notified of the maker's default. If payment is made by the maker, or the first endorser, they have nothing to claim of the subsequent parties on the note. If it is the last endorser who pays, he can claim the whole amount from any of the endorsers before him, or from the maker; and each endorser who pays, has the same right against every previous endorser, and so on to the maker. It is in view of these striking differences between the debtors, *in solido*, as known to the civil law, and the drawer and endorsers of notes and bills of exchange, that Duranton expresses the opinion, that the rights and obligations of the latter are not to be governed wholly by the principles relative to obligations *in solido*, properly speaking. 2 Duranton, No. 563. We, therefore, conclude, that the provisions of the Code, in relation to the interruption of prescription, as regards debtors *in solido*, do not apply to the drawer and endorsers of notes, and other negotiable instruments used in commerce. The conclusion we have come to is at variance with the decision made by this court in *Allain* v. *Longer*,

4 La. 150; but, from the best consideration we have been able to give to the subject, we cannot give our assent to the doctrine therein laid down.

But it has been contended by the appellant's counsel that, as it appears of record that the defendant was an accommodation endorser, he should be viewed in the light of a surety, and that, according to art. 3518, "a citation served on the principal debtor, or his acknowledgment, interrupts prescription on the part of the surety." In the cases of *Nolté & Co.* v. *Their Creditors*, and of *Dorsey & Co.* v. *Their Creditors*, to which we have been referred, this court decided only on the rights of the payee against the maker on accommodation paper. We said, that the payee, or whoever may have lent his name to the maker or drawer, would not be permitted to recover from either, more than he had paid; but that, as to all other parties who come after the payee on the bill, the *lex mercatoria* was to apply, and to govern their rights and obligations. The suretyship between an accommodation endorser and the maker of a note exists only as between themselves; with respect to the holder, their liability must depend on the rules applicable to negotiable instruments in general. The holder must, therefore, take the necessary steps to bind them, and they can avail themselves of any defence which might belong to a maker, or endorser, on business paper. 5 Mart. N. S. 196. 6 Ib. N. S. 518. 7 Ib. N. S. 9, 498. 4 La. 468. Bailey on Bills, 151.

Judgment affirmed.

Charles Slater *v.* The Commercial and Railroad Bank of Vicksburg, and another.

Where the judge, in granting an appeal, whether suspensive or devolutive, omits to state at the foot of the petition praying for it, the amount of the security to be given by the appellant, the appeal must be dismissed. C. P. 574, 575, 578.

Appeal from the District Court of Ouachita, *Willson*, J.

McGuire and *Ray*, for the plaintiff.

Copley, for the appellants.

MORPHY, J. A motion to dismiss this appeal has been made on the ground, that the order of the Judge granting it is illegal and void, not having stated the amount of the surety to be given. The order is, that the appeal be made returnable at the next term of the Supreme Court at Alexandria, on the first Monday of October, 1844, and that the defendants enter into bond with good and sufficient surety, according to law. The appellant gave an appeal bond for $200. The Code of Practice requires that the Judge in granting an appeal, shall state at the foot of the petition of appeal, the amount of the surety to be given by the appellant, and the day on which the appeal shall be returned. Art. 574. This the Judge is bound to do whether the appeal be a suspensive or a devolutive one. Arts. 575, 578. An order which fixes no amount whatever for the bond to be given by the appellant, cannot be the basis of an appeal, under the foregoing provision of law. 5 Mart. N. S. 238. 6 Ib. N. S. 315. 10 La. 86.

Appeal dismissed.

BERNARD HEMKEN *v.* MARIE BARBE LUDEWIG, Curatrix of the Vacant Succession of Augustus Ludewig, deceased.

Courts of probate are without jurisdiction of an action against a curatrix to render her personally liable for the debts of the succession, for mal-administration; or to determine whether real property, which she has not included in the inventory, but claims as her own, belongs to the succession, or not. *Per Curiam:* It is not enough to allege that a defendant is curatrix of an estate, to give jurisdiction to the probate court of a matter not in itself of probate jurisdiction. Even a suit on the bond of a curatrix against her and her sureties individually, must be brought before a court of ordinary jurisdiction, nor can a court of probate inquire directly into the title to real estate.

A demand that an executrix be ordered to account and file a *tableau* of distribution, cannot be cumulated, in an action before a probate court, with a demand against the defendant to render her individually liable for mal-administration. The demands are contrary to each other, and cannot be prosecuted together; and a probate court is without jurisdiction as to the latter.

APPEAL from the Court of Probates of Ouachita, *Lamy*, J.

Simon, J. In order to understand the bearing of the plea to the jurisdiction of the court, *a qua*, upon which the defendant's counsel has insisted before us, and on which, we think, this case must be disposed of, it is necessary to give a statement of the grounds upon which this action is based, and of the nature of the relief which was sought at the hands of the court from whose judgment said defendant has appealed.

The plaintiff represents in his petition, that Ludewig died intestate, leaving a vacant estate which was opened as such, and that *his wife, the defendant, who renounced the marriage community*, was appointed curatrix thereof. That the petitioner *is a creditor of said estate* for a large amount, detailing the particulars of his claim, a considerable portion of which is secured by a mortgage on certain property belonging to the succession, a statement of which is given in the petition. He avers, that the said property was brought into the marriage by the defendant, as mentioned in her marriage contract with the deceased, and that the one-third thereof was donated by her to her husband, as also one-third of all she might die possessed of. That the aforesaid mortgage was given on the whole of said property, with all the rights the deceased had acquired therein, together with other property which he had purchased during the marriage. That during the marriage, valuable improvements were put upon the mortgaged land, whereby its value was increased to a large amount; and that other property having been inherited by the defendant during the marriage, one-third thereof, as also of the children of her slaves, belonged to the deceased.

He further states, that *the defendant has failed to have a legal inventory made of the estate* as curatrix, having given in only a small portion thereof, and *refusing to give in* the larger part, whereby the estate has been appraised at one-fourth of its value. That *she incorrectly declared the quantity of the crop on hand*, &c., so that the land, slaves, and personal property not being specified or identified by the inventory, *a large portion thereof was concealed and converted to her own use, whereby she is liable to pay the whole of the debts of her deceased husband, and not entitled to avail herself of her renunciation of the community.* That she has further neglected her duty as

curatrix, never filed any *tableau* of distribution, has not caused the effects to be sold to pay the debts, &c.

He therefore prays, *that the defendant be compelled to pay the debts of the estate;* that a true inventory thereof be made; that the donated property be decreed to belong thereto; that she file a *tableau* of distribution, on which he claims to be placed as a mortgage creditor; *that her renunciation be considered null and void;* that judgment be rendered against her to account for the estate and pay the debts thereof; or, in default of complying with the legal requisites, *that she be bound to pay said debts out of her individual property;* and that the increased value added to her land be ascertained, and she decreed to pay the amount thereof to the creditors, &c.

The defendant, in her answer, pleads first, that the Court of Probates is without jurisdiction, and cannot take cognizance of the plaintiff's demand. She further avers, that the donation alluded to in the petition has no legal force or existence; that the property said to have been donated by her to her husband, belongs to her; and she proceeds to set up and detail her rights against the estate of her husband, secured by legal mortgage on the property belonging thereto; and she prays to be quieted in her possession of her property; that the plaintiff's demand be rejected, and that her rights against the succession be recognized, &c.

Under these pleadings, the Judge, *a quo*, considered himself authorized to investigate the matters in controversy, declared the donation valid, liquidated the rights of the defendant against the estate of her husband, reserving to both parties the right to class their debts in an action contradictorily with all the creditors of the estate, and reserving all the rights of the plaintiff against defendant for her personal liability to his demands.

The object of this action appears to be twofold: 1. It is an attempt to render the defendant liable, *personally*, to pay the debts of the estate, and particularly that due to the plaintiff; and 2. To compel her, in the mean time, *as curatrix*, to render an account of the estate, and to file a *tableau* of distribution. Two questions arise:

1. Is the object of the first branch of the case, within the jurisdiction of the Probate Court?

2. Is not the second branch necessarily unconnected with the other in the present suit, though it is not declared upon as a distinct ground of action; and can it be consistently carried on with the demand against the defendant personally? Does not the one exclude the other?

I. It is clear the Court of Probates was without jurisdiction to decide on the matters set out in the plaintiff's petition, in relation to the defendant's personal liability. It is true, she is sued *as curatrix*, but one of the principal grounds alleged against her, from which she is said to have incurred a personal responsibility is, that *she has concealed property belonging to the estate, and has converted it to her own use, whereby she has lost the benefit of her renunciation, and has become liable personally to pay the debts of her husband.* The main object of the suit is to obtain judgment against her individually, and such was virtually the judgment appealed from. It is not pretended that the property which she failed to include in the inventory, is in her possession as curatrix, but that she claims the same as her own, and refuses to give it up. Hence necessarily grows out a question of title, which is not presented here collaterally, but directly; since the issue to the plaintiff's demand against her personally, must be, and is actually, that the property by her kept in her possession, belongs to herself and not to the estate, whereby she cannot be made liable personally to pay the amount due to the plaintiff by the succession. It is well settled, that Courts of Probate have no jurisdiction of a claim against an administrator *personally*, for mal-administration; (5 Mart. N. S. 217. 1 La. 65. 6 La. 451. 10 Ib. 427;) that they cannot take cognizance of a suit brought against a surviving wife to annul her renunciation of the community, and make her liable personally to pay the debts thereof; that even a suit on the bond of a curatrix against her and her sureties, to recover against them *individually*, must be instituted in the courts of ordinary jurisdiction; (16 La. 238;) and that the Court of Probates cannot inquire directly into the title of real estate, though there are cases in which it may be done incidentally. It is not enough to allege, that a defendant is curatrix of an estate, to give jurisdiction to the Court

of Probates of a subject matter not in itself of probate jurisdiction. 7 La. 378. 11 Ib. 21, 388. 14 La. 177.

II. This second branch of the case appears in the petition to be the consequence of the other; that is to say, the plaintiff seeks to compel the defendant to render an account of the estate, in case he does not succeed in making her personally liable. But it is clearly a distinct ground of action, and had it stood alone against said defendant *as curatrix*, there is no doubt that the Court of Probates would have had jurisdiction to take cognizance of it, and render a judgment on this object of the plaintiff's demand. But the demand against the defendant as *curatrix*, is inconsistent with the action against her individually; one necessarily precludes the other; they cannot be exercised together; for if she be bound *personally*, there is no object in asking her to render an account *as curatrix;* and if she is ordered to render an account *as curatrix*, this cannot be under the allegations of the petition, but the consequence of the claims against her individually being defeated. Art. 149 of the Code of Practice says, that the plaintiff is not allowed to cumulate several demands in the same action, when one of them is contrary to, or precludes, the other. Different causes of action cannot be cumulated against the same defendant. 6 Mart. N. S. 392. 2 Ib. N. S. 323. A similar question having been presented to our solution in the case of *Blake* v. *His Creditors*, (6 Rob. 526,) we there expressed our opinion, that it was clearly irregular; that the two demands could not be prosecuted together; and that it is the duty of the plaintiff to select and point out the action upon which he relies in the enforcement of his rights. Here, the plaintiff has not made any such selection; he has not abandoned any of his grounds of action; one was within the jurisdiction of the Probate Court, and the other was not; the court, *a qua*, however, appears to have acted upon both, though no judgment was pronounced upon the main one; and we think, that as it stands, the case could not be acted upon in the lower court, and that it must be dismissed. 4 Mart. N. S. 360. 7 Ib. N. S. 400.

It is, therefore, ordered and decreed, that the judgment of the Probate Court be avoided and reversed; and that the present

suit be dismissed at the costs of the plaintiff and appellee in both courts.

McGuire, for the plaintiff.

Copley and *Garrett*, for the appellant.

Alfred J. Lowry *v.* The Commercial and Railroad Bank of Vicksburg.

Where a creditor accepts from the assignees of the bank a certificate, recognizing him as a creditor for the amount of the certificate, and declaring him or his assigns entitled to the benefit of the assignment, and to a *pro rata* proportion of any dividends which may be declared, his transferree cannot dispute the validity of the assignment. *Per Curiam:* By surrendering to the assignees the original evidence of his claim, and accepting the certificate, the creditor acceded to the conditions of the assignment itself.

Appeal from the District Court of Madison, *Curry*, J.

Shannon, for the appellant.

Bemiss and *Snyder*, for the defendants.

Bullard, J. The plaintiff alleges, that the Commercial Railroad Bank of Vicksburg is indebted to him in the sum $16,216, with interest at eight per cent, as evidenced by a certificate of which he is holder by assignment from W. Laughlin, by which the said Bank, through their agents signing as assignees, acknowledge that they are indebted to W. Laughlin in that amount. He alleges, that the assignment from the Bank to said assignees is void, and demands judgment against the corporation.

The instrument upon which the action is brought, is a certificate signed by Bodley and Robins, as general assignees of the Bank, to the effect that Laughlin had filed his claim against the Commercial and Railroad Bank of Vicksburg to the amount above stated, on which he, his representatives or assigns, are entitled to the benefit of said assignment, and to a ratable portion of the dividends which may be declared in pursuance of said deed, said dividend to be payable on the production of this certificate, and receipt endorsed thereon.

The plaintiff's assignor, by surrendering to the assignees the

original evidence of his claim, and accepting this certificate, clearly acceded to the conditions of the assignment itself, and cannot now claim contrary to the tenor of the certificate. The court did not err in giving judgment in favor of the defendants.

Judgment affirmed.

Zenon St. Romain *v.* Royall Robeson.

All exceptions to form are considered as waived where the parties proceed to trial on the merits, without requiring any decision on the exceptions.

Where a party has moved for the homologation of the report of auditors after being amended in certain particulars, he will be thereby precluded from requiring any other amendments.

Action by plaintiff for the settlement of a particular partnership, praying for a sequestration of the partnership property, the liquidation of the partnership affairs, a division of the profits, and the sale of the property. There was a judgment declaring plaintiff in debt to defendant in a certain sum, to be paid out of plaintiff's share of the proceeds of the sale of the partnership effects, which were ordered to be equally divided between the parties. *Held*, that costs are incidental to a judgment, and that plaintiff, having failed to recover, must pay all the costs of the proceedings.

Appeal from the District Court of Avoyelles, *Boyce*, J.

Simon, J. The controversy in this suit grows out of a certain partnership, alleged in the petition to have been contracted between the parties, for the purpose of shipping and carrying freight on board of a horse-boat belonging to the concern, and navigating the said boat on the bayous De Glaize and Rouge, in the parish of Avoyelles. The plaintiff avers, that one-half of the boat was purchased by him from the defendant under their partnership contract; that said boat commenced carrying cotton from said bayous, the profits to be equally divided between the parties; that those profits have amounted to $500, which are in the hands of the defendant; and that said defendant has had the boat engaged in his own private business for the space of two weeks, for which he owes him, plaintiff, the sum of $150. He further states, that as said defendant refuses to settle the partnership accounts, and to pay him his half of the profits, and to employ the boat for the

purposes intended by the contract, he is unwilling to continue the partnership. He prays, that the boat, horses, and all partnership effects be sold; that a partition thereof be made; that the boat, horses, &c. be sequestered; that the partnership affairs be liquidated, the profits divided, and that he have judgment against the defendant for one-half of such profits as may have been made, &c.

The defendant first filed his exceptions to the sequestration, praying that it be set aside; but those exceptions do not appear to have ever been acted on by the lower court. He afterwards filed his answer, in which he sets up divers matters relative to the partnership; alleges that the plaintiff never paid the amount of his purchase of one-half of the boat, &c.; that he failed to furnish 500 bales of cotton for freight according to his contract, and only furnished 222 bales; and that the plaintiff is indebted to him in the several sums charged in divers accounts annexed to his answer, from which there results in his, defendant's, favor a balance of at least $500, for which he prays for judgment, as also for $1000 damages, for the wrongful suing out of the writ of sequestration, which has been the cause of much deterioration of the boat, horses, &c.

The accounts standing between the parties were submitted to auditors, who investigated the matters in dispute between them, and made a report to the court, from which it resulted, that the plaintiff remained indebted to the defendant in the sum of $87 09. A rule to show cause why it should not be homologated, with some exceptions, was taken by the defendant; and, notwithstanding the opposition of the plaintiff, said report was homologated, and became the judgment of the court, *a qua*, from which said defendant has appealed.

It has been insisted before us by the defendant's counsel, that his exceptions to the sequestration, and his motion to have it set aside, should be sustained, on the grounds on file; but nothing in the record shows, that they were ever acted upon in the inferior court. On the contrary, the defendant having filed his answer three days after the exceptions were on file, the case, at the same term and on the same day, was submitted to auditors, who acted upon it, and made their report at the ensuing session; where-

upon, the court rendered the judgment appealed from, without making, in the said judgment, any allusion to the sequestration, except ordering the costs thereof to be paid by the defendant; and saying, that the property sequestered having been sold, the proceeds should be divided between the parties. It is well settled, that all exceptions to form will be considered as waived, if the parties proceed to trial on the merits, without requiring a decision on the exceptions. 4 La. 482. Here, it does not appear that any action or decision of the court below was ever required on the exceptions.

On the merits, the appellant's counsel has called our attention to divers objections which he makes to the report of the auditors, for the purpose of showing that he was not allowed the amount to which he was entitled, and that he was made liable for sums which he did not owe; but as the rule to show cause why said report should not be confirmed, was moved for by him below, and as he only excepted from the confirmation, two items, to wit, one of $65 22 for the use of the boat and horses for fifteen days, and another of $143 due by Brooks & Walker to the firm, the same not having been received by him, we think that his prayer, that said report be amended only in this respect, precludes him from setting up any further opposition to it, and from requiring any other amendment.

As the appellee has not asked, that the judgment appealed from be amended in his favor, we must presume that he is satisfied with it.

The sum of $65 22, however, appears to us to have been improperly allowed to the plaintiff by the auditors; the boat was out of employment, owing to the plaintiff's having neglected to furnish cotton for freight according to contract; and the evidence furnishes no proof of the value of the hire of said boat. It seems also, that the plaintiff consented to the defendant's using the boat.

With regard to the charge of $143, it does not exist in the report, and there is no occasion for any amendment in this respect.

We think also, that the court, *a qua*, erred, in condemning the defendant to pay all the sequestration costs, and one-half of the costs of the suit. The plaintiff had not only failed to pay any

part of the purchase money for his half of the boat, but was in debt to the defendant; he had no claim to set up against the latter; and the evidence shows, that the sequestration was unnecessary. It is well settled, that costs are incidental and accessary to a judgment, and cannot be allowed to a defendant against whom recovery is had. 2 Mart. 312. 11 Ib. 558. 17 La. 269. Code of Pract. arts. 157, 549, 550, 551.

It is, therefore, ordered and decreed, that the judgment appealed from be so modified and amended, that instead of the amount allowed therein to the defendant, the latter do recover of the plaintiff the sum of one hundred and fifty-two dollars and thirty-one cents; and that said plaintiff pay all the expenses and costs of the sequestration by him sued out, and the costs of this suit in both courts; and it is further ordered and decreed, that said judgmen be affirmed in all other respects.

Cushman and *Waddill*, for the plaintiff.

Edelen, for the appellant.

Successions of Samuel, and Elizabeth Floyd—William Briscoe, Appellant.

Where one, who claims to be the creditor of a succession for the amount of an open account, in which he charges the estate with the amount of a draft drawn by the deceased and accepted by him, and with a commission for accepting it, neither produces the draft nor accounts for it, nor shows that it was paid by him, his claim must be rejected.

One not shown to be a creditor of a succession cannot oppose the allowance of claims set up by others.

Appeal from the Court of Probates of Madison, *Downes*, J.

Dunlap and *Snyder*, for the appellant.

Amonett, contra.

Bullard, J. Briscoe, as assignee of Bogart & Hoopes, is appellant from a judgment of the Court of Probates of the parish of Madison, which rejected his claim against the estate of S. and E. Floyd, as it was placed on the *tableau* by the curator. It was opposed by several creditors; and there were other oppositions

upon which the court below pronounced, but which we cannot notice, inasmuch as Briscoe is the only appellant, and no other party prays for any amendment of the judgment in his favor.

The claim of Bogart & Hoopes is in the form of an open account, under date of November, 1835, in which Floyd is charged with their acceptance of his draft on them, of the 6th of November, at fourteen months, for $4518 51, and commissions for acceptance of the same $112 95; total, $4631 46. The draft is neither produced nor accounted for, and there is no evidence that it was ever taken up by the acceptors. The court did not err, therefore, in rejecting the claim upon the merits.

Briscoe, not being a creditor, had no right to make opposition to any other claims.

Judgment affirmed.

John R. Marshall *v.* The Grand Gulf Railroad and Banking Company.

The statute of Mississippi of 21 February, 1840, which prohibits (s. 7) the banks of that State from transferring, by endorsement or otherwise, any note, bill receivable, or other evidence of debt, renders any general assignment by a bank, so far as such *choses in action* are concerned, illegal. *Per Curiam:* The remedy would not have been co-extensive with the evil, if, while the assignment of a particular *chose in action* was forbidden, a bank could make a general assignment of all such property possessed by it.

Plaintiff having sued defendants, a banking company, on notes issued by them, certain persons intervened, alleging that defendants had assigned to them their whole property for the benefit of their creditors; and plaintiff, in answer to the petition of intervention, averred that the assignment was illegal. The intervenors having pleaded the prescription of one year against revocatory actions: *Held*, that the assignees, by seeking to avail themselves of the assignment by way of intervention, became thereby plaintiffs or actors, and that the illegallity being set up by way of exception, prescription cannot be pleaded, under the rule *Quæ temporalia*, &c.

Though a direct action to annul a contract be prescribed, its nullity may be pleaded by the party against whom it is sought to be enforced, at any time, by way of exception.

The illegallity of an assignment made by a bank in the State of Mississippi, in violation of the seventh section of the statute of 21 February, 1840, prohibiting the transfer of any note, bill, or other evidence of debt, may be set up by a creditor

of the bank who has attached its property, where the assignment is pleaded as a means of defeating the attachment. The provision of that section, that any action on a bill, note, or other evidence of debt, so transferred, shall abate on the plea of the defendant, does not restrict to a debtor of the bank the right to plead the illegality of such a transfer.

APPEAL from the District Court of Madison, *Willson*, J.

Snyder, *Dunlap* and *Amonett*, for the plaintiff.

H. H. Strawbridge, *Dunbar*, *Hyams* and *Elgee*, for the appellants.

BULLARD, J. The plaintiff sues to recover $4395, the amount of a number of bank notes issued by the defendants, an incorporated bank of the state of Mississippi. The suit commenced by attachment, but the defendants appeared by counsel, and answered by a general denial, and by averring, that none of their property had been attached.

Thereupon Ingraham & Reed, residing in the state of Mississippi, intervened, and alleged in their petition that, by an act duly executed in that state, in the month of February, 1842, and by subsequent acts, the defendants conveyed and transferred to them as assignees, for the use and benefit of all the creditors of said defendants, their whole property, including that attached in this case, all which, before the institution of this suit, was delivered to them, as the plaintiff and the garnishees were well informed. They, therefore, oppose the plaintiff's demand, and claim the property attached.

The plaintiff answered the petition of intervention, by denying generally the allegations therein, and then avers, that by the law of the state of Mississippi, where the Bank was chartered and is located, all banks are by law prohibited from assigning any evidence of indebtedness; and he denies that the intervenors have, by virtue of the assignment made to them, any interest or title to, or in the property in dispute in this suit. He avers, that the assignment is illegal, void and made in bad faith on the part of the Bank, for the purpose of defrauding a portion of their creditors and of favoring others.

The deed of assignment purports to convey, transfer, set over, and assign to the intervenors, all the property, rights and credits whatever belonging to the corporation, except certain notes and

bills set forth in a schedule, amounting to about $4400, which are reserved. The assignment is believed to be in the usual form, and for the uses and trusts set forth in the petition of intervention.

It is contended, that this assignment is void on two grounds: *first*, because by a statute of the state of Mississippi, passed in 1840, which we had occasion to consider in the case of *Hyde and another* v. *The Planters Bank of Mississippi*, decided in July, 1844, (8 Robinson,) and again at the present term, in the case of *Williams* v. *The Planters Bank of Mississippi and others*, *ante*, p. 125, the banks of that state are forbidden to transfer and assign their notes, bills, or other evidences of debt; and *secondly*, because it gives illegal preferences, and is in fraud of the rights of creditors. We shall consider the question only under the first aspect here presented, to wit, whether the act of 1840 prohibits a general assignment by a bank, so far at least as concerns its *chose in action*.

We are not aware, that the courts of our sister and neighboring state have pronounced upon this question. We are, therefore, left without their aid, in deciding upon the extent to which the act alluded to, takes away the right of banking corporations to make a general assignment. In order to come to a conclusion satisfactory to our own minds upon this point, it is proper to consider together the law of that state, applicable it is believed, to all banking corporations, and which has been incorporated into the amendment of the charter of the Bank now before us, that they shall at all times, be obligated to redeem their notes in specie and receive them in payment of all demands, and that which absolutely forbids them to assign and transfer their notes, or other evidences of debts due to them, passed since the general discomfiture of those institutions. When viewed together, these positive provisions of law clearly indicate the policy of the state to be, to modify, so far as it relates to banks, the general rule of law that the assignee takes the debt or credit transferred, subject to any equity which existed previous to notice of such assignment. Those institutions had flooded the country with paper money, which they were no longer able to redeem, and if permitted to transfer, or assign their port-folios, so as to enable their assignee to reco-

ver and be paid in gold and silver, unless the debtor could show that he had the notes of the bank, so assigning before notice according to the general rule, it would have entailed great losses on the people, and at the same time have enabled the banks, to pay their depositors, or other favored creditors, in preference to their circulation. The remedy would not have been co-extensive with the mischief, if, while the assignment of a particular *chose in action* was forbidden, it had been permitted to make a general assignment of all it possessed of that species of property. The right to make such general assignment according to the law in Mississippi, as we understand it, implies the right on the part of the corporation, in common with other debtors in failing circumstances, to discriminate between different classes of creditors. Now, although according to the tenor of this assignment, a fair distribution may have been contemplated, and provision made for receiving the notes of the Bank in payment, yet according to the pretensions of the Bank, they had a right to make a general assignment like any other debtor. The statute forbidding the assignment goes further than we have found it necessary to go. It declares that the assignee cannot maintain any action on an assignment, but that it shall be sufficient ground for abatement. If the promissory note of A., transferred by the Bank, would not become the property of the assignee so as to enable him to maintain an action upon it, we cannot perceive how it would become valid by a simultaneous transfer of all the other *choses in action*, belonging to the assignor, and authorize such assignee to maintain an action upon it. The prohibition appears to us to apply to each and every *chose in action*, whether assigned separately or in mass; and while it leaves the banks the right to recover at law in suits in their own names, it does not impair the right which each debtor of the banks has to pay at all times in the currency, which they have respectively put in circulation as money.

The judgment of the District Court was against the intervenors; and the plaintiff recovered the amount sued for, and the intervenors and the Bank appealed. In this court the defendants and the intervenors pleaded the prescription of one year, in support of the assignment made by the Grand Gulf Railroad and Banking Company to the intervenors.

The prescription upon which the appellants rely, is that which bars the revocatory action after the lapse of one year. But in the case now before us, the assignees seek to avail themselves of the assignment by way of intervention, and therein become plaintiffs or actors; and the illegality or fraudulent character of the contract is set up by way of exception. It is precisely as if the intervenors had sued as assignees, and the defendant had pleaded the nullity or fraud. Now, although the direct action might be prescribed and barred in one year, yet at whatever period the party seeks to enforce such a contract, the exception will avail him, against whom it is sought to be enforced. *Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum.* Until the contract alleged to be fraudulent is sought to be enforced, the party affected has no interest in opposing it. We had occasion to consider this maxim and its proper application, in the case of *Delahoussaye* v. *Dumartrait*, 16 La. 91. It has been applied in numerous cases, where the vendors of slaves sue to recover the price, and the defence of redhibitory vices or defects has been permitted, long after the direct redhibitory action had been prescribed. The plea is, therefore, overruled.

It is further contended by the counsel for the appellants, that the act of 1840, forbidding the transfer of *choses in action*, only gives to the debtor, when sued by the assignee, the right to cause the action to abate upon his plea, by showing in evidence upon the trial that the same was so transferred, and that the *creditors* of the Bank have no right to set up such a ground of defence.* But we are of opinion, that the first clause of the act containing the prohibition is not controlled by the second, which indicates the plea which will avail the debtor when sued by the assignee for the recovery of the debt. If the credit did not pass by the assignment, a creditor who has levied an attachment upon it, may well plead the illegality of the transfer by which his privilege is sought to be defeated.

Judgment affirmed.

* The act of 21 February, 1840, provides:

Sect. 7. That it shall not be lawful for any bank in this state to transfer, by endorsement or otherwise, any note, bill receivable, or other evidence of debt; and if it shall appear in evidence upon the trial of any action upon any such note, bill receivable, or other evidence of debt, that the same was so transferred, the same shall abate upon the plea of the defendant.

JOHN R. MARSHALL *v.* THE GRAND GULF RAILROAD AND BANKING COMPANY.

APPEAL from the District Court of Tensas, *Willson*, J.

Snyder, *Dunlap*, and *Amonett*, for the plaintiff.

H. H. Strawbridge, *Dunbar*, *Hyams*, and *Elgee*, for the appellants.

BULLARD, J. This case cannot be distinguished from the one just decided between the same parties.

Judgment affirmed.

MARGARET SWEARINGEN and others *v.* DENNIS MCDANIEL, Administrator of the Succession of Peter Stearnes, deceased.

All the parties interested that a judgment shall remain undisturbed, must be made parties to any appeal taken from it, and their names must be included in the appeal bond, or the appeal will be dismissed; and this rule applies to the intervening parties interested in the judgment.

APPEAL from the District Court of Avoyelles, *Baillio*, J.

Cushman, for the plaintiffs.

Waddill, for Eliza McDaniel.

SIMON, J. This case comes up in a very irregular way. It was originally an action instituted by the plaintiffs as heirs of one Peter Stearnes, deceased, against the administrator of the estate of the latter, to be put in possession of said estate, and to compel said administrator to deliver up to them, as heirs, all the effects of the succession in kind, and to render them a full and final account of his administration, &c. This petition was followed by an amended one, filed before issue joined, in which the plaintiffs state the nature of the rights of the deceased against the community existing between him and his widow.

The administrator answered by filing an account, stating that the estate is indebted to various creditors; that the plaintiffs, if entitled to any portion of the succession, cannot take it without first paying the debts; and that the wife of the deceased is en-

titled to, and claims one-half of the property left at his decease, as community property. He prays, that the wife of the deceased be made a party to the suit, and that the property of the succession be sold to pay off the creditors, and that his account be homologated.

In the course of the proceedings, certain creditors of the succession intervened to oppose the plaintiff's demand, until they shall have paid their debts or given security. They require a sale of the property for cash, or that the plaintiffs be ruled to give security.

The plaintiffs filed a written motion to dismiss the creditors' opposition, and subsequently filed their opposition to the account of the administrator. The heirs afterwards filed an amended petition, propounding interrogatories to the administrator and to the widow; and, at divers subsequent times, they filed other amended petitions, which were all received and permitted by the court, except one in which they propounded interrogatories to the administrator and to the intervening creditors, which, having been rejected by the court, is the subject of a bill of exceptions.

The claim of the intervening creditors was investigated, and the court rendered an interlocutory judgment, ordering the property of the estate to be sold for cash to an amount sufficient to satisfy the sum proved to be due to the intervenors; and ordering all the property of said estate to be sold to pay the debts. This became the subject of a motion for a new trial on the part of the plaintiffs, which was overruled.

The plaintiffs then filed another amended petition, propounding interrogatories to the administrator and the widow; which were answered by them respectively; and afterwards, the widow filed her amended answer, in which she sets forth the nature and extent of her claims against the community. The pretensions of the wife were answered by the plaintiffs; depositions were taken by virtue of commissions; other amendments were filed to the pleadings; divers bills of exceptions were taken; a plea to the jurisdiction was also introduced by the administrator; and the court, *a qua*, finally rendered judgment on some of the points in controversy; refused to dismiss the administrator; and ordered that property of the estate should be sold sufficient to pay the

debts, as heretofore ordered, and that the balance be sold under the terms which the plaintiffs and the widow may agree on, or, after hearing them, if they disagree; that, after said sale and the payment of the debts, the proceeds be divided between the parties according to their legal rights (not liquidated); that the administrator continue to collect the credits and notes of the estate; that he render an account of his administration after the sale, or every twelve months thereafter, in which he shall include all the different charges, for or against the parties or the community, established by the decree; and that afterwards said community be equally divided between the plaintiffs and the widow, &c. From this judgment the record shows, that *the plaintiffs and intervenor appealed*, and the order of the court rendered *on their motion* states that a devolutive appeal is granted to them, on each of them furnishing bond and security in the amount of one hundred dollars. Only one bond was filed; it was executed by the widow, (the party called in the suit by the administrator,) in favor of the plaintiffs, who, in the order, are *appellants*, and the administrator, and it does not appear that the creditors, Singleton, who had also intervened, and in whose favor a judgment was rendered, were included among the appellants or the appellees.

The proceedings by which this appeal has been brought up, are so irregular, that, although no motion has been made to dismiss it, we feel bound to refuse taking cognizance of it, not only because the appellants have been made appellees, but principally because all the parties interested in maintaining the judgment appealed from, are not be foreus. Under our present laws fixing the manner in which appeals are to be taken, there is no other way, when an appeal has been granted on motion in open court, to compel the appellees to take notice of the appeal and to appear before us, than by including their names in the appeal bond, which is to be given in their favor; this was not done with regard to the creditors of the succession who had intervened in the cause for the protection of their rights, although they are interested in the judgment appealed from; and we have often said, that all the parties who are interested that the judgment should remain undisturbed, must be made parties to the appeal, or it

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debts, as heretofore ordered, and that the balance be sold under the terms which the plaintiffs and the widow may agree on, or, after hearing them, if they disagree; that, after said sale and the payment of the debts, the proceeds be divided between the parties according to their legal rights (not liquidated); that the administrator continue to collect the credits and notes of the estate; that he render an account of his administration after the sale, or every twelve months thereafter, in which he shall include all the different charges, for or against the parties or the community, established by the decree; and that afterwards said community be equally divided between the plaintiffs and the widow, &c. From this judgment the record shows, that *the plaintiffs and intervenor appealed*, and the order of the court rendered *on their motion* states that a devolutive appeal is granted to them, on each of them furnishing bond and security in the amount of one hundred dollars. Only one bond was filed; it was executed by the widow, (the party called in the suit by the administrator,) in favor of the plaintiffs, who, in the order, are *appellants*, and the administrator, and it does not appear that the creditors, Singleton, who had also intervened, and in whose favor a judgment was rendered, were included among the appellants or the appellees.

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will be dismissed; (12 La. 271. 16 Ib. 109. 17 Ib. 346. 3 Rob. 436;) and that the rule applies to intervening parties to a suit having an interest in the judgment. 15 La. 362. Their not appealing will make us presume, that being satisfied with the judgment, they have acquiesced in it; but they should then be brought before us as appellees, on the appellant's giving a bond in their favor according to law.

Appeal dismissed.

TEMPLE S. COONS, Curator of the Succession of Chany Gatewood, deceased, *v.* ALFRED GRAHAM, Curator of the Succession of John Graham, deceased.

Where the names of the signers of a twelve-months bond do not appear in the body of the instrument, nor in the return of the sheriff, and there is no attestation by the sheriff that it was signed before him, or in the presence of witnesses, the signature of a surety must be proved, to entitle the party in whose favor it was made, to recover against such surety.

Where the judge before whom an action on a twelve-months bond was tried was sworn as a witness to prove a signature, but the record omits to state the name of the person whose signature he was sworn to prove, though it shows that a judgment was rendered by the same judge in favor of plaintiff, it will be presumed that the person, the proof of whose signature was essential to a recovery, was the one whose signature was actually proved.

Where the owner of property seized under execution becomes its purchaser, at a credit of twelve months, he cannot be considered as acquiring any new right or title by the adjudication, which is not strictly a sale, but a means by which the creditor acquires additional security for his debt. Nor will the sureties on the bond be discharged by the omission of the creditor to require the execution of an act of sale to the debtor, with the reservation of a mortgage on the property to secure the price, though the sureties might, for their own protection, have insisted on such an act of sale being executed and recorded. *Aliter*, if, having received a mortgage, the creditor had subsequently released it; in such a case the sureties would be discharged. C. C. 3030.

Where the principal in a twelve-months bond is estopped by his execution of the bond from urging any informalities in the sale, as a defence to an action on the bond, his sureties, bound *in solido* with him, will be equally estopped from setting up any such defence.

APPEAL from the Court of Probates of Madison, *Downes*, J.

Stacy, for the plaintiff.

A. Pierse, and *F. H.* and *T. P. Farrar*, for the appellant.

MORPHY, J. The petitioner, as curator of the estate of Chany Gatewood, sues to recover from the succession of John Graham, the amount of a twelve-months bond for five thousand dollars, with interest thereon, at five per cent *per annum*, from the 15th of June, 1838, subject to a credit of ($710, paid on the 2d day of August, 1839,) signed by William Nevels as principal, and by the said John Graham and Edward R. J. Allnutt, as sureties, in favor of William G. Milliken. He alleges that, on the 10th of July, 1838, the said William G. Milliken, for a valuable consideration, assigned and transferred to the deceased Chany Gatewood, the judgment he had against William Nevels, and the bond given to secure it. That no part of this bond was ever paid by Nevels, except the amount credited on it; and that the said John Graham having bound himself, *in solido*, with the principal, Nevels, became liable for the balance due on this obligation to C. Gatewood, but that the curator, to whom the claim was presented, refuses to acknowledge it as a just debt against the estate. The defendant pleaded the general issue, and averred, that he had no knowledge of the genuineness of the signature of the deceased on the bond, or of its execution. The rest of the answer may be considered as a brief filed in the case; such parts of which will be hereafter noticed, as may appear material.* There was a judgment below for the plaintiff, and the defendant appealed.

The record shows, that William G. Milliken having obtained against William Nevels a judgment for $5000, levied an execution on a tract of land of his debtor, who, at the second exposure of the property for sale, bought it in, on the 15th of June, 1838, on a credit of twelve months, and furnished the bond which is now in suit. It appears that no act of sale was executed by the Sheriff to Nevels, who remained in possession of the property under the adjudication made to him. Having failed to pay the bond at its maturity, an execution was issued upon it, and the same property was sold, producing the net amount credited on the bond.

* This answer was not filed by the counsel who appeared for the defendant in the Supreme Court.

The main points of defence set up in the answer, and made in this court, are:

1. That the signature of John Graham, on the bond, is not proved, and that this bond is not an authentic act, and does not prove itself when sued on as an evidence of debt.

2. That no act of sale was executed to Nevels by the Sheriff, nor any special mortgage retained upon the property; and that the sureties on their bond could not be subrogated to all the legal rights of the creditor, whereby they were discharged.

3. That the sale on the *fi. fa.* was not legally made, as it is not proved by the Sheriff's return, or otherwise, that the property was legally advertised, or any of the requisites of the law complied with.

4. That the plaintiff has no right to sue; that the bond was never transferred to Chany Gatewood by Milliken, nor is it certain that the judgment was; that the description in the transfer is too vague, and no consideration purports to have been paid, &c.

I. The bond purports to be signed by Wm. Nevels, John Graham, and Edward R. J. Allnutt, but the Sheriff has not attested the signatures of these persons as having been made before him, or in presence of witnesses, and the names of the sureties do not appear in the body of the bond, nor in the return of that officer. It is clear, then, as contended for by the appellants, that this instrument was not an authentic act, and that it was necessary to prove the signature of John Graham, which, he says, has not been done. R. C. Downes, the Probate Judge who tried this case, appears to have been sworn, as a witness, to prove a signature on the bond, but the name of the person, whose signature was intended to be proved by him, has been left out of his testimony, as it comes before us in the transcript. As the proof of Graham's signature to the instrument sued on was a material fact to make out the plaintiff's case, and we find the same Judge giving a judgment in his favor, we are satisfied, that the signature on the bond, which he was called upon to prove as a witness in the cause before him, was that of Graham, and that he proved it.

II. When the owner of property seized in execution becomes the purchaser on a credit of twelve months, he cannot be con-

sidered as acquiring any new right or title by the adjudication. As to him, it is not, legally speaking, a sale, but merely a means by which the creditor acquires additional security for his debt. If he is satisfied with such security, he is under no obligation of insisting on the Sheriff's executing a conveyance to the judgment debtor of his own property, and stipulating a mortgage therein for the benefit of the sureties on the twelve-months bond. The latter, for their own protection, might have insisted on such a sale being passed and recorded. Not having done so themselves, they cannot urge the failure of the creditor to take a mortgage as a ground for their discharge. It would be otherwise if he had received a mortgage, and subsequently released it. Civ. Code, art. 3030. But even admitting, that the judgment creditor was bound to take this mortgage, or is responsible for the performance of a duty imposed by law on the Sheriff, and not on him, the sureties in the present case cannot complain, as they have not suffered from the omission. On their failure to pay the bond at maturity, an execution issued upon it, and the proceeds of the sale which followed, were credited on the bond in the same manner as if a special mortgage had been retained on the property. It has not been shown, nor is it pretended, that any other mortgage has been recorded on the land during the year, and before the resale of it on the execution which issued on the twelve-months bond. Had they paid the bond, and been subrogated to a special mortgage, in case one had been retained, they could have had nothing more than the right of taking out an execution on the bond, as the judgment creditor has done. Of this execution they have had the full benefit, and cannot complain. 9 La. 9, 98.

III. The twelve-months bond in this case having been given by Nevels, the defendant in the original execution, he could surely not have complained of any informalities in the sale, as the execution of the bond implies, on his part, a waiver of any objections which might have been made, if the property had been sold to another. His consent cured every irregularity. If he could not have set up this defence in a suit upon his bond, his sureties, *in solido*, cannot. *Jones* v. *Frelsen and others*, 9 Robinson, 185.

IV. The transfer made to Chany Gatewood is vague; makes no mention of the twelve-months bond, and describes the judgment itself very imperfectly; but, whether doubt or uncertainty may exist as to the purport and meaning of this instrument from its face, they are removed by the testimony of the transferror, Milliken, taken by the defendant, under a commission. He declares, in substance, that he sold his judgment against Nevels to C. Gatewood, and that this sale was intended to embrace the twelve-months bond taken in the suit in which the judgment was rendered, and that he made this assignment in payment of a debt due by him to Gatewood. Our attention has been called by the defendant's counsel to various circumstances disclosed by the record, with a view to cast suspicion on this assignment. Even should we consider it as having been a simulated one, when it was made, this could have no bearing on the present suit. It is not pretended, that the estate of Graham has been deprived by this transfer of any defence which might have been set up against Milliken, were he the person suing upon this bond.

Judgment affirmed.

Govy Hood *v.* Heloise Segrest.

Where an act of sale of real property was signed by the parties in the presence of a parish judge, acting as a notary, no other proof of execution is necessary to authorize its being recorded, and to give it the effect against third persons which the law allows to acts *sous seing privé* duly registered. C. C. 2242, 2250.

An act of sale, not authentic, owing to the want of the signature of one of the witnesses, or through any other defect of form, is good as a private writing, if signed by the parties. C. C. 2232.

Where a vendor sells the property in a slave, reserving the usufruct during his life, his possession being based upon the reservation of usufruct, cannot support a plea of prescription. One cannot prescribe against his own title, nor change, by his own act, the nature and origin of his possession. C. C. 3480.

Appeal from the District Court of Carroll, *Willson*, J.

Selby and *Dunlap*, for the appellant.

Stacy and *Sparrow*, contra.

SIMON, J. The object of this controversy is to ascertain who has the best title to a family of slaves which the parties claim respectively under the same vendor.

A suit having been instituted by Hood against the defendant, Segrest, as a possessory action for the recovery of the slaves, then in the possession of the latter, it came before us by appeal upon the question whether it was a possessory or a petitory action, and we were of opinion that it was the latter. See the case of *Hood* v. *Segrest*, (1 Robinson, 109.) In the mean time, the second suit was brought for slander of title by Segrest, involving the same question, and the two suits were consolidated and tried together.

The cases were submitted to a jury, who finally found a verdict in favor of the defendant in the first suit, and in favor of the same person, as plaintiff, in the second; and said verdict having become the judgment of the inferior court, quieting Segrest in her possession and title to the slaves in controversy, Govy Hood, after an unsuccessful attempt to obtain a new trial, took this appeal.

The facts of this case bearing upon the question of title are these: On the 18th of November, 1833, Bardee Segrest executed an act before the Parish Judge, purporting to be a sale of a female slave named Lucy, by him made to James B. Prescott, for and in consideration of the sum of $500 to him in hand paid by the vendee, with the stipulation that *said slave was to remain in the possession of the vendor, and to his use, until his death, but that said vendor was not to sell or mortgage the slave to the prejudice of the act.* Thus, the right of property was sold to Prescott with a reservation of the usufruct in favor of the vendor until his death. This act was signed by the parties with one witness, although two are named in the act, and *acknowledged by them before the Parish Judge* acting as notary public, who also signed it. It was *immediately recorded on the same day*, by the said Parish Judge, who states in his certificate, that it was recorded in his office in notarial book A, fo. 130. The parol evidence taken on the trial shows, that the vendor, Segrest, died in May, 1840; that the slave sold and her children remained in his possession until his death, and that the appellee took possession of them,

about July, 1840, when they were delivered over to her by Prescott, her vendor, who had sold them to her by a regular notarial deed, executed on the 9th of July, 1840, for and in consideration of the sum of $800, to him in hand paid.

But it appears that, on the 28th of March, 1838, Bardee Segrest executed a notarial act of sale of his property, consisting of a tract of land on the river Mississippi, with the improvements thereon, and several slaves, among whom two of the slaves in controversy are included, to the appellant Hood, who, according to the evidence, lived in the same house with his vendor, for and in consideration of the sum of $13,000. B. Segrest, however, continued to keep the slaves in his possession, to treat them as his own, and to have them assessed, and to pay the taxes on them as his property; and the testimony establishes the facts, that no land lying on the Mississippi river was ever assessed to Hood on the tax roll of 1839; that the same was assessed to Segrest by the assessors under his oath; that Hood was called on for his taxable property and did not declare it; and that, after the conveyance to Hood, said land was seized by the Sheriff as Segrest's property, offered for sale, and after all due formalities, was adjudicated to the highest bidder, Louis Selby, Esq., Hood's counsel in this cause, for $425. The evidence of this last fact was rejected by the Judge, *a quo*, but is incorporated in the bill of exceptions.

In addition to the above facts, and in support of the allegations of fraud and simulation pleaded in the appellee's answers, the record discloses substantially the following circumstances: That Segrest, previous to his conveyance to Hood, offered to sell the slaves to divers persons, for the purpose of avoiding the payment of a certain debt, and that afterwards the property was to be re-conveyed to him when the debt was settled. That, in 1839, one of the witnesses hired the slave Lucy from Segrest, and paid him the hire. That there was no difference in the control exercised by Segrest over the slave Lucy, before and after the sale to Hood. Divers other facts were proved, tending to show that no money was paid by Hood for the price of the property conveyed to him by Segrest; that the latter had no other property besides what he sold to Hood; that they lived together in the same house; that Hood charged Segrest for payment of taxes upon the land and

slaves which he now claims as his own; and that Hood, though applied to for that purpose, refused to rent the land a short time before Segrest's death, and only commenced renting it in June, 1840.

But the principal question which this case presents, and on which it must turn, grows out of a bill of exceptions, taken by the appellee's counsel to the opinion of the Judge, *a quo*, sustaining the appellant's objections to the introduction in evidence of the act of sale from Segrest to Prescott, executed on the 18th of November, 1833. Said objections were: 1. That said act had not been recorded in the Parish Judge's office, according to law; as it was not acknowledged by the party, or proven by the oath of a subscribing witness, previously to its being recorded.

2. That said act is incomplete on its face, and never was finished.

3. That the appellee, in her pleadings, claimed title by notarial act, and this was one under private signature.

We think the District Court erred in refusing to receive said act in evidence:

I. As we have already remarked, the act under consideration was signed by the parties in the presence of the Parish Judge and two witnesses, one of whom signed it, and it recites that it was acknowledged by the vendor before the said Parish Judge, all which is attested by the officer under his signature. Said act was spread upon the records of his office on the same day it was executed, and was clearly in sufficient form to authorize its being recorded, and to give it, against third persons, the effect which the law allows to acts under private signature duly recorded. Civ. Code, art. 2242. Art. 2250 of the Code says: "The record of an act purporting to be a sale or exchange of real property, shall not have effect against creditors, or *bona fide* purchasers, unless, *previous to its being recorded, it was acknowledged by the party*, or proved by the oath of one of the subscribing witnesses, *and the certificate of such acknowledgment be signed by a judge or notary, and recorded with the instrument.*" All this appears to have been done in this case. The Judge had received the acknowledgment of the vendor, had seen him write his name, the act was duly attested under the officer's signature; and

we cannot see the necessity of proving the signature of the party by any witness, when the officer himself has seen said party write his name at the close of the act. It was clearly sufficiently proved to be recorded.

II. Art. 2232 of the Civil Code, provides that, "an act which is not authentic, through the incompetence or the incapacity of the officer, *or through a defect of form, shall avail as a private writing, if it be signed by the parties.*" The mere quoting of this law is a sufficient answer to the objection; as if, for the want of the signature of one of the witnesses to the act, it had not the authenticity required by law to make it a public act, it was undoubtedly good as one under private signature. Civ. Code, arts. 2231, 2233, 2237, 2238. 8 Mart. N. S. 501.

III. This objection was insufficient to preclude the production of the deed. Such as it is, it is fully described in the pleadings; no mistake could be made in its identity; and, on referring to one of the appellee's amended answers, we find that it is stated that, "*the allegations* that she holds the slaves in controversy by virtue *of a notarial act, was made in error.*" This objection was rather futile, as the appellant well knew the appellee's title, and was in no danger of being taken by surprise.

Upon the whole, we are of opinion, that the verdict of the jury, rendered in the absence of the appellee's principal document, and without her having been allowed to show the basis of her title to the slaves in controversy, is fully sustained by the evidence; and, *a fortiori*, should it be maintained, since the title of the said appellee is now more clearly made out by the admission in evidence of the deed of sale which had been rejected below.

With regard to the appellant's plea of prescription, so much relied on by his counsel in his brief, it is untenable.* His vendor's possession was based upon the reservation of usufruct stipulated in the deed to Prescott; and it is a well known rule in matters of prescription, that "one cannot prescribe against his own title, in this sense, that he cannot change, by his own act,

* The action by Hood was commenced on the 20th July, 1840. The petition of Segrest, in her action for slander of title, was filed on the 17th of May, 1841.

the nature and the origin of his possession." Civ. Code, art. 3480.

Judgment affirmed.

SUCCESSION OF SILAS F. THOMAS.—PATRICK H. GLAZE, Administrator, Appellant.

The creditors of a succession have no right to intervene in proceedings by the heirs to compel an administrator to render his accounts. Such proceedings cannot prejudice their claims against the estate.

A widow, who has accepted the community, is entitled to one-half of the balance found due after a full administration and the payment of all the debts of the estate; but she cannot by a petition to the Court of Probates, require the administrator of her husband's estate to account, and recover judgment for a specific sum against him, with interest from judicial demand, and cause herself to be placed on the *tableau* of distribution for such sum as if she were a creditor of the estate. An administrator owes but one account to the legal representatives of the deceased; and the judgment of the court, rendered contradictorily with the heirs and the widow, on a motion to homologate the account rendered by the administrator, should ascertain the balance due to the estate. Such balance bears interest at five per cent from the time of rendering the account, and the widow is entitled to one-half of it.

The acknowledgment by the vendor, in an authentic act of sale of real estate, that the price had been received by him, can be contradicted only by a counter letter, or by the acknowledgment of the purchaser, or his heirs, in answer to interrogatories on facts and articles.

APPEAL, by the administrator of the succession of Silas F. Thomas, deceased, from a judgment of the Court of Probates of Avoyelles, *Baillio*, J.

BULLARD, J. This controversy commenced by a petition and supplemental petition, presented by the widow of Silas F. Thomas, demanding that Patrick H. Glaze, who had been for several years administrator of the estate of Thomas, should render an account of his administration. She alleges herself to be the widow in community, and entitled to one-half of the net balance belonging to the estate, and she claims judgment for eight thousand dollars, with interest, from judicial demand. The heirs of Thomas were made parties to the proceeding, on the prayer of the widow, Atalanta Thomas.

The administrator filed his account, supported by numerous vouchers, showing a balance in his favor, including his commissions, of $2600. This account was filed on the 1st February, 1841; and, in the petition accompanying the account, he prays for judgment for the balance in his favor, and for the homologation of the account.

On the 26th of February, the widow filed an opposition to the account, setting forth, at great length and with great minuteness, the alleged errors of which she complains. She concludes her opposition by praying: 1. That all items objected to as illegal claims against the estate, amounting in all to $22,146 72, alleged to have been paid by the administrator, be placed to the credit of the estate, and that the administrator be charged therewith. 2. That all claims due the estate, and uncollected for want of due diligence on the part of the administrator, amounting to $3182 63, be placed to the credit of the estate. 3. That the opponent be placed on the *tableau* for the sum of $12,664 67, and that she have judgment for that amount.

Oakey also opposed what he calls the *tableau*, because he was a creditor of the estate, and not placed thereon; and Kirkman, Knettles & Co. opposed for the same reason.

At this stage of the proceedings commenced that confusion in which this case is involved. It arose from confounding this rendition of accounts by the administrator, at the suit of the heirs of the intestate, with a *tableau* of distribution filed by the administrator, or a preliminary statement of debts. It appears, that Glaze had gone on to settle the estate, having been a commercial partner of the deceased, without observing the usual forms of filing a *tableau*, and proceeding to classify the debts. The opposing creditors themselves had entered into private arrangements with the administrator, and had not provoked any *tableau* of distribution. The only question which was presented in relation to Oakey, and Kirkman, Knettles & Co. was, whether, as against the heirs of Thomas, the administrator was entitled to a credit for the amount of their claims, and that depended upon the question whether they had been paid. If the administrator had used the assets of the estate to discharge the debt, he was chargeable with them; and if, without the fault of the heirs, those assets turned

out insufficient, the administrator might still be liable to the creditor. Admitting that a balance was still due, it appears to us irregular for those creditors to interfere in the way they have done, because no proceeding in this case can prejudice their claim against the estate. In this view of the case, there was, substantially, no error in dismissing their oppositions.

This confusion has arisen from another circumstance to which it is proper at this time to advert; and that is, that the widow supposed she might, in such a proceeding, be entitled to a judgment for a specific sum against the administrator, with interest, from judicial demand, and that she ought to be placed on the *tableau* for such amount, as if she were a creditor of the estate. The judgment finally rendered, has, to a certain extent, sanctioned these pretensions, and is, in that respect, clearly erroneous. The administrator owes but one account to the legal representatives of the deceased. The widow who accepts the community, is entitled to one-half of the balance found due, after a full administration and payment of all the charges of the estate; but the account rendered, and finally approved contradictorily with the heirs and the widow, must ascertain the amount to which the widow is entitled. The Judge ought, in our opinion, to have established a balance due *to the estate*, and not a particular sum due to the widow; and that balance, if any, would bear an interest at five per cent, from the rendition of the account, and the widow would be entitled to one-half of such balance.

It is conceded also, that there was error in disallowing the commissions of the administrator.

Having disposed of these matters, and expressed our view as to the relative position of the parties, and the character of the judgment which it would be proper to render, we come to consider one of the most important matters involved in the controversy, which is brought forward by an amendment to the administrator's petition, praying for the homologation of his account.

On the 14th July, 1841, the administrator presented the amended petition, in which he alleges, that he neglected, in his first account, to credit himself, and charge the estate, with five thousand dollars, as the price of a tract of land sold by him to the deceased,

by act passed before R. B. Marshall,* June 5, 1835, better known as the town of Holmesville, together with a stock of merchandize. He alleges, that although the receipt of the price is acknowledged in the act, yet, in point of fact, nothing was ever paid, and the estate is still indebted to him that amount, with interest. He prays leave to amend his account, or *tableau*, accordingly. In order to prove this allegation, having taken no counter letter showing that the price had in fact not been paid, he puts interrogatories on facts and articles to each of the heirs, and to Atalanta Thomas, the widow. As the answer of the heirs, or their refusal or neglect to answer, could not affect the widow, and as the answer of Marshall, who is not an heir, is inadmissible to show simulation between the parties, we confine our attention to the interrogatories propounded to the widow herself, and her answers.

The interrogatories propounded to the widow are as follow:

1. Is it not of your knowledge, that Silas F. Thomas never paid Patrick H. Glaze the sum of five thousand dollars, mentioned in the act of sale of the Holmesville place?

2. Did you, or not, shortly after the decease of your husband, while going to Opelousas, or some other place, with Mr. P. H. Glaze, state to him that you knew, or was aware, that Mr. Thomas had not paid Mr. Glaze the amount of five thousand dollars, the price stipulated in the said act of sale?

3. Do you know that Mr. S. F. Thomas ever had, of his own, funds, at any one time, and especially on or before the 5th of June, 1835, the sum of five thousand dollars cash.

4. From the large amount uncollected of the sale of the preceding years, and the disbursements made for the purchase of new goods, and payments of old debts, could it have been possible for Mr. Thomas, on his own account, to have raised five thousand dollars on the 5th of June, 1835?

5. If you know that Mr. Thomas did pay the five thousand dollars mentioned, state when and in what manner?

6. Please state if S. F. Thomas had any capital when he commenced merchandizing, and how much, and of what it consisted?

* Marshall was a notary, and the act an authentic one.

7. State if S. F. Thomas had any other source of revenue except the little store.

8. Please state what interest he had in the partnership with Glaze.

It is to be remarked, that the real estate here spoken of, was sold as a part of the estate of Thomas, and the administrator charged himself in his account with the proceeds.

Atalanta Thomas answered to the 1st interrogatory: That she does not think that Silas F. Thomas paid for the same at the time of the sale; but thinks that Glaze was satisfied for it out of the proceeds of the store. To the 2d: That she does not know. To the 3d: That she does not know, but does not think he had. To the 4th: That she knows nothing relative to the firm of Glaze & Thomas; but with regard to Thomas, she heard, both from him and Glaze, that he, Thomas, had realized ten thousand dollars; and she heard it in this way, viz. Glaze & Thomas, on examining the books, declared the net profits to be ten thousand dollars. To the 5th: That she does not know; that she has heard so from P. H. Glaze since the institution of this suit. [The widow appears to have answered both the interrogatories propounded to the heirs and those to herself.] To the 5th, (addressed to herself,) she says, she has answered this previously. To the 6th, she answers, that she does not know, but does not believe he had any. To the 7th, she answers in the negative. To the 8th: That at one time he was in partnership with Glaze; towards the latter part of his life, he was doing business in his own individual name; when he was in partnership, does not know what was his interest therein.

If these answers clearly made out the simulation in the sale of the land, we should think the administrator entitled to the credit demanded. Without a counter letter, such evidence alone can be used, and it cannot be eked out by the testimony of witnesses. While the widow admits, that the price was probably not paid at the time of the sale, and that her husband was without means to raise that amount in money, yet, *she thinks* it was settled, and that Glaze was satisfied out of the proceeds of the store. This is certainly not positive; but coupled with the fact, that the interests of the parties were much blended together, and that when

the account was first filed, the administrator charged himself with the proceeds of the same property as belonging to the estate, it leaves it so doubtful, as not to authorize us to disregard the formal acknowledgment in the deed that the price had been paid; and the court did not err in rejecting the credit asked for.

Thus, we are of opinion, that the court erred in giving judgment for a specific sum, in favor of the widow, with interest, from judicial demand, instead of striking a balance, if any there be, against the administrator, with interest, from the rendition of the account, on the balance so struck; and also, in not allowing commissions. It is clear, the administrator is chargeable with such uncollected claims due to the estate as have been lost through his negligence, and it is incumbent on him to show diligence. He is entitled to be credited for every sum, justly due, which he has paid, or from which he has in any way liberated the estate. But such is the state of the record, and so numerous the items contested, that we are not able to apply the evidence in the record, so as to render a final judgment, without the hazard of great injustice to one or the other party. The case must, therefore, be remanded for further proceedings.

The judgment of the Court of Probates is, therefore, reversed; and it is further ordered and decreed, that the cause be remanded for a new trial, and further proceedings according to law, and that the appellee pay the costs of the appeal.

Cushman, *Waddill*, *H. Taylor*, and *Swayze*, for the appellant.

Edelen, for the appellee, A. Thomas.

Dunbar and *Hyams*, for the opposing creditors.

WILLIAM BARRY GROVE *v.* WILLIAM HARVEY and another.

Where one styling himself the agent of another takes the oath and signs the bond necessary to obtain an attachment, without sufficient authority from his principal, the attachment must be dissolved, though the acts of the pretended agent be subsequently ratified by the principal. The authority of the agent must exist at the time of the attachment. C. P. 245.

A power to sign an attachment bond must be special. C. C. 2966.

APPEAL from the District Court of Madison, *Willson*, J.

Bemiss, for the appellant, contended that the attachment should be maintained, citing Civ. Code, art. 2961. 7 Mart. N. S. 145. 11 La. 288. 9 Ibid. 78. Story on Agency, 49, 51, 55, 59, 239, 246.

Stacy and *Sparrow*, for the defendants.

SIMON, J. This case was once before us on one of the grounds set up by the defendants for dissolving the attachment by which the suit was commenced. We reversed the judgment of the lower court, sustaining the said ground, and being of opinion that the plaintiff should be allowed the opportunity of proving that the person who made the affidavit, and executed the bond for him, for the purpose of obtaining the attachment, had his authority to do so. We remanded this case for further proceedings according to law. See 3 Robinson, 271.

On the return of our mandate to the inferior court, the second ground for dissolving the attachment, to wit, that no affidavit or bond has ever been made or signed by the plaintiff personally, or by his duly authorized agent or attorney in fact, in the manner prescribed by law, was taken up, and written evidence was produced to show the power under which the affidavit was made, and the bond executed, and to establish a ratification by the plaintiff of the acts of his agent, or *negotiorum gestor;* and the motion to set the attachment aside was overruled by the Judge, *a quo*.

The defendants answered to the merits of the action, pretending, mainly, that although the note sued on has been transferred to the plaintiff, it was so transferred after maturity, and in the state of Mississippi, and with a full knowledge, on his part, of the failure of the consideration. They set up the reasons why

the said consideration has failed; plead the existence of a bond stipulating a penalty by the plaintiff's transferror in the sum of ten thousand dollars, as a security for the title to the property for the price of which the note sued on was partly given; allege that their vendor had no title to said property at the time of the sale, and that the bond is forfeited in their favor; they call their said vendor in the suit, and pray for a diminution of the price to the amount of $25,000, and that the note sued on be ordered to be received by defendants, as a part payment of the said deduction and diminution, and be delivered up to them accordingly.

The Judge, *a quo*, after an investigation of the merits of this case, being of opinion that the plea of payment or compensation set up in the answer had been legally established, ordered the note sued on to be compensated with the bond to an amount thereof sufficient to extinguish said note; and from this judgment, after a vain attempt to obtain a new trial, the plaintiff has appealed.

The first object of our inquiry is, whether the authority of the person who took the oath, and signed the attachment bond for the plaintiff, has been sufficiently established; and, therefore, whether the court, *a qua*, erred in overruling the defendant's motion to dissolve said attachment?

The attachment was granted upon the oath of one E. H. Shepherd, who also subscribed the attachment bond, styling himself the agent of William B. Grove; and, in order to prove that he was duly authorized to take said oath, and to bind his principal in the bond, an instrument in writing, purporting to have been signed and acknowledged by Grove, before three witnesses, and to have been proved under oath, by two of the subscribing witnesses, before the clerk of the court of Haywood county, state of Tennessee, was produced, but was objected to by the defendant's counsel, on the ground that the signature of Grove to said document was not legally proved to be genuine, and that the same was not passed and authenticated in the manner required by law to make it an authentic act, &c. The Judge, *a quo*, admitted it in evidence, and the defendants took a bill of exceptions to his opinion.

It is not our purpose to examine whether the document ob-

jected to was properly received in evidence, or not. For the sake of argument upon its effect, we shall admit that it was sufficiently proved to be genuine, and that it was duly authenticated; as, under the view we have taken of its bearing upon the case, we think it more advisable, and more proper, that we should at once express our opinion upon its legal effect upon the rights of the parties in whose favor and against whom the attachment has been obtained and issued.

The instrument under consideration first recites, that William B. Grove recognizes and acknowledges Egbert H. Shepherd to have been his true and lawful attorney in fact, and agent to transact any and all business in his name, during the last five years in the State of Louisiana; at his discretion to sue or be sued, employ counsel, appoint agents or attorneys, one or more, and to revoke the same at his pleasure, and to act in all matters in which he, the plaintiff, may be concerned in said State as fully as he could do, or could have done in person. He further goes on to say: "I do more particularly recognize his authority as my agent and attorney in fact, to bring a certain suit sometime pending in the District Court of the parish of Madison, State of Louisiana, in which I, William B. Grove, was plaintiff, and one William Harvey, defendant, which was commenced by attachment, on the 25th day of September, 1840; hereby acknowledging that said Shepherd had full authority from me at the time said suit was brought, to institute, support, and carry on the same, and to make all necessary affidavits as my agent, in executing the attachment bond, and to do all things, &c." This act was executed on the 12th of November, 1842.

It is clear, that Shepherd, at the time of the institution of this suit, and of the granting of the attachment, 25th of February, 1840, had no sufficient authority from the person in whose name he acted as agent, to bind him on the attachment bond; he did it as his *negotiorum gestor;* and the object of the evidence was to show a ratification of his acts on the part of his principal, more than two years and six months after the unauthorized attachment had had its effect. This ratification was executed after the filing of the defendants' motion to set aside the proceedings had on the attachment, after the judgment of this court had passed

upon one of the grounds of dissolution, and was not even in existence at the time the plaintiff complained before us, that he had been prevented from proving the authority of the person who had acted for him. It is also worthy of notice, that the attachment suit alluded to in the act of ratification, is therein recited to have been instituted on the 25th of September, 1840, whilst the present suit was brought on the 25th of February, 1840. This would be insufficient in itself to protect and cover the acts of the agent in this case, as, although it may have been inserted through error, the description of the suit does not correspond with the act intended to be ratified; and the principal, would, perhaps, have a right to set up as his defence, if a suit was to be brought against him for damages on the attachment bond, that he never intended to ratify the signing of a bond for him more than six months before. Be this as it may, the question at issue on this point is, can the plaintiff's ratification have a retroactive effect, so as to give validity to proceedings originally invalid? Or, rather, does the rule, "*Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*," apply to this case?

It is first necessary to premise, that according to the terms and true spirit of our attachment laws, it is required, that before the defendant is dispossessed and deprived of the use of the property upon which the attachment is to be levied, the plaintiff should give a bond, as a security for the payment of such damages as the defendant may recover against him, in case it should be decided that the attachment was wrongfully obtained. Code of Pract. art. 245. The bond, it is true, is prospective in its operation; but being given as a security against the consequences of a proceeding which is to have an immediate effect upon the rights of a third person, by depriving that person of the use and enjoyment of his property, it seems that that being the principal condition on which the attachment can be granted, the responsibility of the party for whose benefit it is obtained, should exist at the time of its enforcement, that is to say, at the time that the attachment is levied. A bond signed by an unauthorized person, from which another party may be injured, and against which injury the bond is intended to provide, is no bond at all, in the sense of the law, and cannot be the basis of proceedings, the consequences

of which may cause damage to another. Its validity, and the liability arising therefrom, should exist simultaneously with the proceeding to which it gives rise; as otherwise, attachments, or other proceedings of the same nature, might issue without the defendant's having any other means of redress or remedy for the injury he may have sustained, but that which would depend upon the mere will of his adversary; or, in other words, upon his subsequent and uncertain ratification of the act done by an unauthorized person assuming to act as his agent.

It is true, as a general rule, that a subsequent ratification gives validity to an unauthorized act of a *negotiorum gestor*, and that the maxim above quoted generally applies. It has, when fairly made, the same effect as an original authority to bind the principal, and our Code is explicit upon this subject. Civ. Code, arts. 1789, 2252. 7 Mart. N. S. 143. 11 La. 288. 2 Rob. 20. It is true, also, that, if the authority first generally recited in the document under consideration, had existed at the time of the institution of this suit, it would have been sufficient to empower the agent to take the oath required by law; (Civ. Code, arts. 2963, 2964;) but it was too general to authorize him to sign the attachment bond, so as to be then binding upon the principal. Our law requires, in such cases, that the power should be special; (Civ. Code, art. 2966;) and it is clear, therefore, that the only reason why effect could be given to the attachment bond, would only result from the plaintiff's subsequent ratification, which, we have already said, cannot have any retroactive effect in a case of this kind, so as to render valid, proceedings which originally were illegal and void. Story, in his Commentaries on the Law of Agency, § 246, establishes a distinction which, we think, covers the present case. He says: "*If the act done by such person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damages or losses for the non-performance of that act or duty, or would defeat a right, there, the subsequent ratification or adoption of the unauthorized act by the principal will not give validity to it, so as to bind such third person to the consequences.*" In § 247, he illustrates the doctrine: "*So*," says he, "*the demand made of goods, by an unauthorized person, will not, al-*

though adopted by the principal, be evidence to support an action of trover for a conversion. So, a demand by a person, not authorized, of payment of a promissory note or bill of exchange, would not, though ratified by the holder, constitute a good demand upon the party, so as to make him liable for damages for his default." So, in this case, ought we to say, that an attachment issued on the oath and bond of a person unauthorized to sign it, should not, though subsequently ratified by the plaintiff, subject the defendant to being deprived of his rights to the property attached, or defeat his right to having the attachment dissolved. Story, also, says, that "the rule, *omnis ratihabitio retrotrahitur, et mandato priori æquiparatur*, is only applicable to cases where the conduct of the parties, on whom it is to operate, not being referable to any agreement, *cannot, in the mean time, depend on the fact, whether there be a ratification or not.*

With this view of the question, we think the attachment must be dissolved, and the suit dismissed.

It is, therefore, ordered and decreed, that the judgment of the District Court, though rendered on the merits, in favor of the defendants and appellees, be avoided and reversed; and it is ordered and decreed, that the motion made by said defendants to set aside the attachment be sustained; that said attachment be dissolved, and that this suit be dismissed; the plaintiff and appellant paying the costs in both courts.

Same Case—On an Application for a Re-hearing.

Where an absentee against whom an action had been commenced by attachment excepted to the attachment, but, on the exception being overruled, pleaded to the merits, he will be entitled, if the exception was erroneously overruled, to require that the action be dismissed. The benefit of his exception is not waived by his answer made under the order of the court.

Bemiss, for a re-hearing, urged, that the defendant, Harvey, having appeared by attorney, the action should not be dismissed,

though the attachment were dissolved; citing, 1 Mart. 266. 6 Ibid. 574. 8 Mart. N. S. 352. 13 La. 11, 109.

Simon, J. The appellee having been brought into court only by the attachment, and not *by a citation served upon him personally, or at his domicil*, had a right to appear, to except to it, and to show it was illegally issued, and obtain thereby the dismissal of the attachment, and of the suit, as a consequence. His exceptions were overruled below, and he was ordered to answer to the merits; but he could not lose the benefit of those exceptions which, we think, ought to have been sustained.

Re-hearing refused.

James Erwin *v.* The Commercial and Railroad Bank of Vicksburg.

Where the petition for an appeal, drawn up in the names both of the defendants and a garnishee, was not signed by the counsel of the former, through inadvertence, but the bond, executed in pursuance of the order of the judge allowing the appeal, was executed in the name of both appellants, though not signed by the defendants, it is sufficient. The omission of the attorney to sign the petition is not such a fault of the appellants as will justify the dismissal of the appeal. The omission may be supplied under section 19 of the act of 20th March, 1839.

In attachment cases all the forms must be strictly complied with, or the proceedings will be void.

Plaintiff who had obtained an attachment on giving a bond as required by law, represented that the attachment had not been served or levied according to law, and was therefore void, and prayed that another attachment might be issued, which was done, but no new bond was executed. The bond referred only to the first attachment. *Held*, that the liability of the surety in the bond related exclusively to the first attachment and bound him only for any damage resulting from it; that the bond could not be revived without his consent; and that the second attachment must be dismissed.

An attachment bond must be for a sum exceeding by one-half the whole amount claimed, inclusive of the interest which had accrued up to the date of filing the petition. C. P. 245.

Appeal from the District Court of Madison, *Curry*, J. This was an action on certificates of deposit, of the Commercial and Railroad Bank of Vicksburg, payable after date at a period fixed, and bearing interest, at five per cent a year till due. The plain-

tiff claimed interest at the rate of 12½ per cent a year, from the date of the demand made on the defendants, according to the laws of the state of Mississippi, where the deposit was made and the Bank situated.

BULLARD, J. The appellee has moved to dismiss the appeal in this case on the ground that it is not taken by the defendants, but by the garnishee alone; the petition of appeal not having been signed either by the defendants, their attorney in fact, or advocate.

It appears that the petition was in the name both of the defendants and the garnishee, but was signed only by the counsel for the garnishee. The Judge regarded it as the petition of both, and granted the appeal upon the appellants' giving bond, and the bond was given both by the Bank and the garnishee. The omission of the signature of the counsel for the Bank, being a mere matter of form was allowed to be supplied in this court. All the essential, substantial forms have been complied with, by obtaining the order of the Judge, and giving the bond required by law.* If the counsel omitted to sign the petition, it was not so much the fault of the appellants as to justify our dismissing the appeal; but such an irregularity was properly allowed to be corrected according to the 19th section of the act of March, 1839, amendatory of the Code of Practice. The motion is, therefore, overruled.

Upon the merits, the appellants have made, and rely upon the following points:

1st. That the bond for the attachment was not given for a sufficient amount; that $6000 was claimed in the petition; that the interest then due amounted according to the judgment to $1200, and that one-half over the amount thus claimed was $10,800, and the bond was only for $10,000.

2d. That there was in the proceedings carried on, and in which the judgment was rendered, no existing bond. Two attachments were sued out, the first, on which the bond was given, having been voluntarily abandoned by the plaintiff before the second was obtained, and the liability of the surety on the bond

* The bond was drawn up in the names of the defendants and the garnishee, but it was signed by the surety and the garnishee only.

fixed under that attachment. That the bond applies only to that attachment, *eo nomine.*

3d. That there never was any legal service of citation in either of the attachments. One was posted at the door of the clerk's office, and the other at the door of the Sheriff's office.

4th. That no property was attached by the Sheriff; and lastly, that no attorney was appointed by the court to represent the defendants in the attachment, in which the proceedings were had, and the judgment rendered; the attorney first appointed not being authorized to act in relation to the second attachment.

It is so well settled that in attachment cases, the forms of the law must be strictly adhered to, that it is hardly necessary to repeat it. The law provides as a condition precedent upon which alone a writ of attachment can issue, that the plaintiff shall give bond with security upon which the defendant can recover the damages sustained by him, if it should turn out that the attachment issued improperly. In the present case the only bond given recites that an attachment had issued on the day it bears date, to wit, the 5th of February; the writ was issued on the same day. The bond refers to that attachment and no other. The surety was liable for any damages sustained in consequence of the improper issuing of the writ of that date.

On the 26th of May, following, the plaintiff's agent made a new affidavit, setting forth the indebtedness and residence abroad of the defendants, and states further, "that the attachment already issued in this case has not been served or levied according to law, and that the same is void. He, therefore, prays that another writ of attachment may issue." The clerk of the court to whom this affidavit appears to have been presented, orders a new attachment in these words, "a sufficient showing having been made, and the bond filed being considered satisfactory, it is, therefore, ordered that a writ of attachment issue according to law." The writ accordingly issued, and was served. The attorney who had been appointed under the original attachment, without any new appointment, put in an answer, in November, 1842, in which he denies all the allegations in the petition, and avers, that the defendants are not in court either by service of citation, or by pro-

perty attached; and the defendants further allege a general assignment of all their property to trustees or assignees, for the benefit of their creditors.

It is clear, that the surety on the bond is liable for the illegal attachment of the 5th of February. When that proceeding was abandoned, and a new writ taken out, his liability could not be revived without his consent. The bond had done its office, and no longer existed except in relation to damages sustained in the suing out of the first writ. If the surety were sued for damages alleged to have been sustained under the writ of attachment issued on the 26th of May, which was executed by seizing the effects of the defendants, he might reply successfully, that he never consented to any such proceeding; that his liability had already attached on his bond by the abandonment of the first, and that he could not be rendered liable twice on the same bond.

But even if this were doubtful, it is quite clear that the bond was not of sufficient amount. The sum demanded was $6000, with interest at five per cent, from the 22d of March, 1839, until due on the 1st of March, 1840, and at twelve and a half per cent afterwards. When the petition was filed on the 5th of March, 1842, there was according to the allegation in the petition upwards of $7000, and the bond is not for a sum exceeding that by one-half. Code of Pract. art. 245. 17 La. 437.

This view of the case renders it unnecessary to pronouce upon the other allege l nullities in the proceedings.

It is, therefore, ordered and adjudged, that the judgment of the District Court be reversed; and it is further decreed, that the attachment be set aside, and the suit dismissed, with costs in both courts, to be paid by the plaintiff and appellee.

Bemiss and *Amonett*, for the plaintiff.

A. Pierse, for the defendants, appellants.

Stacy and *Sparrow*, for the garnishee, appellant.

The New Orleans Savings Bank *v.* John F. Harper and another, Executors of Richard L. Smith.

Notice to the drawer of the protest of a bill for non-payment, directed to him at a post-office not the nearest to his residence, without any proof that he was in the habit of receiving his letters and papers there, is insufficient.

A promise by the drawer to pay a bill, from which he has been released by illegalities in the notice of protest, will not be binding, unless it be proved that he was aware of his discharge at the time of the promise.

The drawer is not entitled to notice of non-payment by the acceptor, where the bill was accepted merely for the accommodation of the former.

Appeal from the Court of Probates of Concordia, *Mc Whorter*, J.

Shaw, *Dunlap*, *Stacy* and *Sparrow*, for the appellants. The drawer of the bill sued on was not entitled to notice of protest; the bill was for his accommodation; and he had not provided funds to meet it. Bailey on Bills, 297 note, 302, 304 note, 458. Chitty on Bills, 198. *Bell* v. *Norwood's Adm'r*, 7 La. 102. *Keith* v. *Mackey*, 5 Rob. 278.

F. H. and *T. P. Farrar*, for the defendants. The drawer was entitled to notice of non-payment. *Hill* v. *Martin*, 12 Mart. 177. *Bloodgood* v. *Hawthorn*, 9 La. 128. *Williams* v. *Brashear*, 19 La. 370. 10 Peters. 572. Story on Bills, 369, 373. No legal notice was given. *Mechanics and Traders Bank* v. *Compton*, 3 Rob. 3. *Nicholson* v. *Marders*, Ib. 242. *Union Bank of Louisiana* v. *Brown*, 1 Rob. 107. The promise by the drawer to pay was not binding, it not being shown that he was, at the time, aware of his discharge. *Harris* v. *Allnutt*, 12 La. 465. *Williams* v. *Robinson*, 13 La. 419. *Glenn* v. *Thistle*, 1 Rob. 572.

Morphy, J. This action is brought to recover of the succession of R. L. Smith the amount of a protested bill of exchange, held by the plaintiffs, for $2277 77, dated Natchez, the 11th of October, 1836, drawn by the deceased on Brander, McKenna & Wright, and by them accepted, payable fifteen months after date, in favor of William Harris, and by him endorsed, subject to a deduction of $600, paid by the acceptors on the 10th of Au-

gust, 1838. There was a judgment below against the plaintiffs, from which they appealed.

The bill was protested in New Orleans for want of payment, on the 13th of January, 1838, and the certificate of the notary shows that, on the same day, he deposited notices of protest to the drawer and endorser in the post-office, directed to them respectively at Natchez, Mississippi.

The notice thus given to R. L. Smith was clearly bad, as the evidence shows, that at the time of the protest, in 1838, he resided near Choctaw bayou, in the then parish of Concordia; that there were, at that period, two post-offices, one at Rodney, in Mississippi, and one at Harrisonburg, in Louisiana, some ten or twelve miles nearer to the residence of the deceased than Natchez; and no attempt has been made to show that he was in the habit of getting his letters and papers at the latter office. Some declarations of the deceased that he would pay the bill, were relied on as proving a wavier of notice on his part; but it has not been shown that he was aware at the time that he had been discharged by the *laches* of the holder. 12 La. 465. 13 La. 419. 1 Rob. 572. Story on Bills, § 373. But it is urged, on the part of the appellants, that the drawer of this bill was not entitled to any notice, because he had no funds in the hands of the drawees, Brander, McKenna & Wright, whose acceptance was purely for his accommodation. This position presents the main questionin the cause.

The testimony of Hamilton Wright and H. F. McKenna, two members of the firm who accepted the bill, and who have since been discharged under the bankrupt law from all their liabilities up to the 10th of March, 1842, has been taken under a commission. They declare that their firm accepted the draft sued on for the accommodation and benefit of the drawer, Smith; that they received nothing from him to pay the same, and that he had no funds in their hands at the date, nor at the maturity of the draft. They say, that they do not know for what purpose it was drawn, but know that it was made for Smith's benefit, and that he got the proceeds of it; that he was indebted to their firm, and that his succession is yet indebted to their firm, or their assignees, independent of this draft; that Smith repeatedly acknowledged

the debt as his own, and promised to pay. They think that the last time he promised to pay said draft was in 1841. On the other hand, the executors of the estate have shown that, in 1836, and 1837, there existed between the acceptors and the deceased those transactions and dealings which exist between a planter and his commission merchant; that, on the 14th of April, 1836, and on the 1st of March, 1837, they rendered to him two accounts of sales of cotton, the first amounting to $930 83, and the other to $1139 20, and that about that time they shipped to him sundry articles for his plantation. Were these commercial dealings between the drawer and the drawees in proof before us on a question of want of notice, or the mere acceptance of this bill, we would probably hold, under the principles of the commercial law, and our own decisions, that the former was entitled to notice of the dishonor of the bill, although in point of fact he had no funds in the hands of the latter, because he might, in good faith, have expected that his factors would have accepted it. *Bloodgood* v. *Hawthorn*, 9 La. 134. *Williams* v. *Broadhead*, 19 La. 370. But in the present case, the evidence shows the nature of the transaction when it took place. The acceptance was made for the sole accommodation of the drawer, who, at that time, impliedly undertook to provide funds for the due payment of the bill at its maturity. He received the proceeds of it when discounted, and always acknowledged the debt as his own. It has not been shown that the commercial dealings spoken of between him and the drawees were kept up to the time of the maturity of the bill, so as to justify, or render probable, the expectation that they might possibly have funds belonging to him to any amount. He has not shown that he made any provision to meet this draft. If, previously to its maturity, he had any funds in the hands of the acceptors, he had withdrawn them, and left the draft unprovided for, having made with such acceptors no arrangement or agreement which gave him the right to expect that it would be paid by them, how can he be supposed to have suffered any loss by the want of notice? The dealings which are shown to have existed between him and the acceptors, in 1836 and 1837, cannot alter the character of the original transaction, which was one to raise money for the drawer on the credit of the acceptors.

Had he taken up the bill, he would have paid a debt for which he was primarily bound as regards the acceptors, and would have had no remedy either against them or anybody else; whereas, had they paid the draft, the drawer would have been liable to refund the money to them without any protest or notice. He cannot, therefore, be said to have been entitled to notice, unless it is shown that he has sustained some special loss or injury from the want of it. It is well settled that the drawer is not entitled to notice of non-payment by the acceptor, if the bill has been accepted merely for his accommodation. Bailey on Bills, 302. Story on Bills, § 310, 311, and 312.

The plea of prescription was set up in this court. The record shows, that more than five years have elapsed between the maturity of the bill, and the inception of the present suit. We are not satisfied that the loose declaration of Smith that he would pay the bill, made out of the presence of the plaintiffs, and at a time which is not positively shown, should be viewed as a sufficient acknowledgment of the debt to interrupt prescription. The witness speaks with no certainty as to the date of such promises. They may have been made before the maturity of the draft, and, if so, did not interrupt prescription. 10 La. 569. The plaintiffs have asked, that this cause be remanded for trial upon the plea of prescription now set up for the first time. This they have a right to under article 902 of the Code of Practice. In complying with this request, we have thought it best to remand the case to be tried, *de novo*, upon its merits generally. This will afford both parties an opportunity of giving additional evidence, and will be conducive to the ends of justice.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed, and that this case be remanded, to be proceeded in according to law; the appellees paying the costs of this appeal.

Berry A. Wilson *v.* Mary Vincent.

Rule on defendant to show cause why an execution should not be issued against her individually for a debt due by the succession of which she was curatrix. Defendant failed to appear. The rule was made absolute, and she appealed. The citation to answer the rule was served on a person stated in the return to be the attorney in fact of the curatrix. There was no allegation in the rule that the defendant was absent from the State; and the power only authorized the attorney to represent her in her capacity of curatrix. *Held*, that the rule must be discharged, for, assuming that defendant was absent at the time of serving the citation, the power only authorized the attorney to represent her as curatrix, and the object of the rule was to render her personally liable.

Appeal from the Court of Probates of Claiborne, *Drew*, J.

Morphy, J. In the case of *Wilson* v. *Murrell*, wherein the defendant was sought to be made liable as surety on the bond of Mary Vincent, as curatrix of the vacant estate of Josiah Vincent, the plaintiff was nonsuited on the ground that his proceedings against the surety were premature, as he had not taken the necessary steps to enforce payment against the principal, pursuant to the act of the 16th of March, 1842. 6 Rob. 68. The plaintiff then took a rule on Mary Vincent, the curatrix, to show cause why an execution should not issue against her, in her individual capacity, for the sum of $315, with ten per cent interest thereon from the 31st of December, 1839. The curatrix having failed to appear, the rule was made absolute, and she appealed.

It is urged on the part of the appellant, that the judgment against her should be reversed, as she has never been legally cited. The record shows, that two citations directed to Mary Vincent, curatrix, were served by the Sheriff of the parish of Claiborne; one of the returns mentions, that he delivered a certified copy of the citation and petition to Isaac Murrell, at the usual residence of John Murrell, Sen'r, he being absent from home; the other says, that "he delivered a copy of the citation and petition to John Murrell, Sen'r, attorney in fact for Mary Vincent, curatrix, at his usual residence, about fourteen miles from Overton." The first citation was clearly defective, and seems to have been so considered by the plaintiff himself, as he thought proper to take out another. The second citation is objected to on the

ground that it has not been alleged in the petition, that the defendant was absent from the State at the time of the institution of the suit, nor that John Murrell, Sen'r, was her attorney in fact; and we have been referred to the cases of *McMicken* v. *Smith*, (5 Mart. N. S. 429,) and to that of *Pilié* v. *Kenna*, (16 La. 570.)

To this it is answered, that in the cases quoted nothing showed, nor was it alleged in the petition, that the person upon whom service was made was the agent of the defendant; whereas in this suit the record shows, that John Murrell, Sen'r, was the duly constituted attorney in fact of the curatrix, Mary Vincent; that article 1145 of the Civil Code authorized her, in case she wished to be absent for a time, to leave with some person residing in the parish where the succession was opened, her general and special power of attorney to represent her in all the acts of her administration as curatrix, and to deposit an authentic copy of this power of attorney, before her departure, in the office of the Judge who appointed her; that the defendant, having done so, the citation served on her agent was sufficient and legal. On examining the power of attorney, which was executed on the 18th of September, 1841, we find that it is a special power authorizing J. Murrell, Sen'r, to represent her only in her capacity of curatrix, to admit claims, render an account, &c. Even were we to presume that she absented herself, and that her absence continued up to February, 1844, when this proceeding was instituted against her, yet it is clear that, under the special power she left to J. Murrell, Sen'r, he was competent to represent her only in her official capacity as curatrix of the estate of Josiah Vincent. The rule taken against her had for its object to render her personally liable. If it is made absolute, it will operate as a judgment against her individually, to be satisfied out of her own property. The word, *curatrix*, which is added to the name in the citation, can be considered only as a *descriptio personæ*. The proceeding, in point of fact, is one against Mary Vincent in her own name, and not as curatrix. John Murrell, Sen'r, was not her general agent, and had no capacity to represent her in relation to her private affairs, or any suit or proceeding brought against her individually. As it does not appear to us that the defendant was legally cited, the judgment appealed from must be set aside.

It is, therefore, ordered, that the judgment of the Court of Probates be reversed, and the case remanded for further proceedings according to law, the plaintiff and appellee paying the costs of this appeal.

Peets and *Garrett*, for the plaintiff.

Lawson, for the appellant.

THE UNION BANK OF LOUISIANA *v.* RALPH CUSHMAN.

The certificate of the notary by whom a note was protested that demand of payment was made at the proper place, is *prima facie* evidence against the endorser, and sufficient, *per se*, until rebutted by direct proof.

APPEAL from the District Court of Avoyelles, *Boyce*, J.

H. Taylor and *Swayze*, for the plaintiffs, cited 13 La. 360. 14 Ib. 391.

Cushman, pro se.

MORPHY, J. This is an action brought against R. Cushman, as endorser of a promissory note for $1005, made payable at the office of discount and deposit of the Union Bank of Louisiana, at Avoyelles. There was a judgment below in favor of the plaintiffs, and he has appealed. It is contended, on the part of the appellant, that there is no evidence of a demand having been made at the place of payment indicated in the note sued on. The notary states, in his protest, that he went to the office of discount and deposit of the branch of the Union Bank of Louisiana at Hydropolis, and there presented the note to Lucien D. Coco, the cashier of the aforesaid Branch Bank, *where the same is made payable*, and demanded of him payment thereof, &c. The protest is headed "State of Louisiana, parish of Avoyelles," and the notary states, that he is a notary in and for the said parish. Independent of any knowledge of our own, we are authorized to conclude, from this instrument, that Hydropolis is a village within the parish of Avoyelles, and that the Avoyelles branch of the Union Bank, mentioned in the note, is located there. It is not pretended that there is any other branch of the

Union Bank in Avoyelles than that at Hydropolis. As this court said in *Poydras* v. *Bell*, the notary's certificate forms *prima facie* evidence that the demand was made at the proper place, and is, *per se*, sufficient, until rebutted by direct proof. 14 La. 392.

Judgment affirmed.

MICHAEL H. DOSSON, Curator of the Succession of Hugh B. Johnson, *v.* WADWELL SANDERS.

The authentic evidence required to authorize the issuing of an order of seizure and sale must be complete so far as relates to the debt. Thus where a mortgage by authentic act was executed under power of attorney, or where a note secured by such a mortgage has been assigned, the power and the assignment must be proved by authentic acts. As relates to the capacity of persons suing *en auter droit*, *prima facie* evidence of their right is sufficient. In such a case, copies of the bond and oath of a curator, certified under the hand and seal of the probate judge to be true copies from the originals on file in his office, will be sufficient evidence of the capacity of the plaintiff, though the letters of curatorship would be, perhaps, better evidence.

The certificate of a notary that he presented a note, which was payable at the office of a parish judge, at the said office, to a person in the office, and demanded payment thereof, and was informed that there were no funds to pay it, is sufficient evidence of demand against the drawer of the note.

APPEAL from the District Court of Franklin, *Willson*, J.

Purvis, for the plaintiff.

Copley, for the appellant.

MORPHY, J. The defendant has appealed from an order of seizure and sale taken out of the lower court, by the petitioner, as the curator of the estate of Hugh B. Johnson. The *fiat* of the Judge was given on a *procès-verbal* of the adjudication of a slave to Wadwell Sanders at the probate sale of the succession, signed by the purchaser in presence of two witnesses and the Judge of the parish of Catahoula, acting *ex officio* as auctioneer, and on two of the notes he had given in payment of the property, which notes were paraphed *ne varietur* by the said Judge.

The appellant's counsel has assigned as errors apparent on the face of the record:

1. That the District Judge had not before him legal and authentic evidence of the capacity assumed by the petitioner, to authorize the issuing of an order of seizure and sale.

2. That a sufficient demand of payment at the place mentioned on the face of the notes sued on, was not shown.

I. We find in the record copies of the bond given, and of the oath taken by the petitioner, as curator of the succession of Hugh B. Johnson, before the Probate Judge of the parish of Catahoula, and these documents are certified under the hand and seal of the said Judge, as correct copies from the originals on file. Letters of curatorship, duly attested, would have been, perhaps, better evidence of the appointment of M. H. Dosson as curator, than that produced below; but as the bond and oath received by the Judge of Probates necessarily presupposed an appointment made by him, we think that the District Judge had sufficient proof of the right and capacity of the person applying for the order on behalf of the estate. Civ. Code, arts. 1119, 1120. The authentic evidence required by the Code to authorize the issuing of an order of seizure and sale must be complete, so far as regards the debt sought to be enforced by this summary proceeding. If, for instance, a mortgage by an authentic act has been executed under a power of attorney from the mortgagor, or if a note secured by mortgage has been assigned, the power of attorney and the assignment must appear from authentic act, otherwise the whole evidence of the debt would not be of that character which the law requires to be the basis of executory process. As relates to the capacity of persons suing *en auter droit*, it is sufficient, we think, if they make a *prima facie* showing of their right and quality. *Rowlett* v. *Shepherd*, 7 Mart. N. S. 514. In a case like the present, and in many others which can easily be imagined, such persons cannot produce authentic acts, as defined by the Code, to show their right to sue, nor is it necessary that they should.

II. In relation to the demand made at the place where the two notes in suit were payable, such demand, if necessary at all in a case like the present, is proved by a protest to be found in the

record. The notes were made payable at the office of the Parish Judge of Catahoula, and the notary declares* that, on the 1st of March, 1845, he presented them, at that place, to one George S. Sawyer then in the office, the Parish Judge being absent, and demanded payment of him, and was answered that no funds had been deposited there to pay such notes, &c. Such a demand appears to us fully sufficient against the drawer of a note.

Judgment affirmed.

HENDERSON TAYLOR *v.* JEAN PIERRE NORMAND, Administrator of the Succession of Pierre Normand.

Where plaintiff sues on a note as having been transferred to him, and the note, which is annexed to and prayed to be taken as a part of the petition, shows that it was transferred to the plaintiff and another person, and there is no evidence that plaintiff afterwards acquired the whole interest in it, the variance between the *allegata* and *probata* will be fatal.

APPEAL from the Court of Probates of New Orleans, *Baillio*, J.

SIMON, J. This suit is brought upon a promissory note, made payable to the order of one Justin Normand, and transferred by him after maturity to Taylor & Swayze.

The defendant first pleads the general issue, and denies specially, that the plaintiff is the *bona fide* holder, or owner of said note for a valuable consideration. He further alleges divers matters in avoidance of the plaintiff's right of recovery, pretends that it was transferred for the purpose of depriving him, defendant, and the forced heirs of the maker of the note, of a substantial and good defence against the same; and states the grounds upon which his defence is based.

There was judgment below in favor of the plaintiff, and the defendant appealed.

Our attention has been first called to the manner in which this suit was instituted, and to the endorsement on the note, purport-

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* In his certificate of protest.

ing to be a transfer thereof to Taylor & Swayze, whilst the suit is in the name of Henderson Taylor; and it has been contended, that as it is not alleged, and no evidence has been produced to show that the transferrors have ever transferred their right to the plaintiff, said plaintiff, from his own showing, has no title thereto, so as to claim its amount in his own private name.

The petition states, that the note sued on *was transferred by the payee to the petitioner;* and said note, introduced in evidence, together with the transfer written on its back, to establish the debt, and the plaintiff's title thereto, proves the fact that it belongs to Taylor & Swayze, by whom, nothing shows, it ever was transferred to the plaintiff. The transfer exhibited by the production of the endorsement, was thus made to two persons, who became the creditors jointly of the maker of said note; and it is clear, that one of them has no right to sue for and recover the whole amount thereof, without alleging, and being able and prepared to show, that the interest of his co-obligee has been transferred to him.

But it has been urged, that the petition being signed by *Taylor & Swayze*, who are partners, in the practice of the law, and to whom the note was apparently transferred, this may be considered as a recognition of the plaintiff's right, on the part of Swayze, and as conclusive proof that the title to the note is in his partner, Taylor, and that he has no interest in it. This might be true, if it was shown that the signature to the petition is in the handwriting of Swayze, for, then, although it is signed in the name of the firm as attorneys "*for plaintiff*," he, Swayze, might be, perhaps, precluded thereby from gainsaying the allegations contained in the petition. But we cannot presume that the petition is signed by Swayze, when the suit is brought by Taylor; and it is obvious that such presumption, which could always be rebutted by direct proof, would be insufficient to divest Swayze of his interest in a note transferred to him jointly with Taylor. If he has really transferred his interest to his partner, the fact should have been alleged and proved; but as the case stands, Taylor's title, under the evidence, being only to one-half of the note; and said note having been declared upon

as transferred to the petitioner, it is clear, on the one hand, that the *probata* do not agree with the *allegata*, and on the other, that the judgment rendered in this case, at the suit of the plaintiff, would not be *res judicata* against his co-obligee.

We think, however, that, although it is not possible for us to pronounce on the merits of this cause in its actual state, because the plaintiff has failed to allege and prove the transfer of his partner's interest to him, the fact of said plaintiff's being entitled, on the face of the transfer, to claim one-half of the note sued on, and the circumstance of the signature of the petition being in the name of both, are sufficient to make us abstain from dismissing the action; and, we think, that the end of justice will be more properly attained by our remanding the cause to the lower court for a new trial, so as to afford the plaintiff an opportunity of proving that the signature to the petition is in the handwriting of Swayze; or of amending his said petition, so as to allege and prove that the interest of the latter has been transferred to him. The court below thought, that the allegations and proof were sufficient, and the plaintiff may have been thereby led into the error that he could recover without alleging or proving a transfer to him, on the presumption arising from the signature of the professional firm to the petition. Code of Pract. art. 906. 8 Mart. N. S. 328. 1 La. 269. 3 Ibid. 341. 13 Ibid. 186. 15 Ibid. 208, 231. 18 Ibid. 320. We are, therefore, of opinion that this is a proper case to authorize us to exercise our legal discretion.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be annulled and reversed, and that this cause be remanded to the lower court for a new trial, for the purposes set forth in this opinion; the plaintiff and appellee paying the costs of this appeal.

Taylor and *Swayze*, for the plaintiff.

Cushman and *Edelen*, for the appellant.

Aspasie Buard *v.* Alexis Lemée, Syndic of the Succession of Dassize Bossier and Pierre Evariste Bossier.

The partners in a particular partnership are not bound, *in solido*, for the debts of the firm, but each for his share only, calculated in proportion to the number of the partners (C. C. 2844); nor can one partner bind the rest, unless empowered to do so specially, or by the articles of partnership. C. C. 2843.

The words *joint debtor* in art. 3517 of the Civil Code, were inserted in the English text of that article, through an error of the translator or transcriber. The article must be interpreted as applying to debtors *in solido*.

The acknowledgment of a debt by one joint debtor, or a suit brought by or against one of several joint debtors, does not interrupt prescription as to the rest.

To interrupt or renounce prescription, the acknowledgment must be of a particular, specific debt. Proof that the party acknowledged in conversations with the witnesses, that he was largely indebted to the plaintiff, is insufficient.

The renunciation, like the acceptance, of a succession, has effect from the opening of the succession.

The rights of creditors having privileges or mortgages are fixed at the time of the debtor's death.

A partnership is dissolved by the death of one of the partners, unless there be a stipulation to the contrary (C. C. 285), but where the succession of a partner in a particular partnership is insolvent, and administered with the benefit of inventory, the partnership cannot be continued without the assent of all the creditors, though the articles of partnership have provided for its continuance.

After the dissolution of a partnership none of the members can bind the rest, nor the partnership, for the payment of a debt which has been prescribed.

Appeal from the District Court of Natchitoches, *Campbell*, J.

Simon, J. This appeal is taken by the defendant, as syndic of the insolvent successions of Dassize Bossier and Pierre Evariste Bossier, both deceased, from a judgment which orders him to pay in his said capacity to the plaintiff, the sum of $19,088, with eight per cent interest per annum thereon from the 21st of May, 1840, said sum and interest to be paid jointly by the said successions; and further ordering, that the mortgage set forth in the petition be allowed, recognized, and enforced against both estates.

The facts of this case are these: Dassize Bossier and P. E. Bossier owned, in partnership, a certain plantation and slaves, and they cultivated the plantation in partnership. They were indebted to the plaintiff in a large sum of money, upon seven

notes of hand, three of which were subscribed by "Dassize Bossier," and the other four by "Bossier *frères*," all bearing eight per cent interest until paid. Those notes were due as follows: one for $1815 95 on the 1st of May, 1832; another for $1961, on the 1st of May, 1833; another for $2118, on the 1st of May, 1834; another for $2287 50, on the 1st of May, 1835; another for $1000, on the 6th of April, 1831; another for $1065, on the 11th of April, 1833; and the last one for $1080, on the 1st of July, 1833; and they were all made payable to the plaintiff, or to her order.

Dassize Bossier died on the 14th of October, 1839, and his estate remained in the possession of his widow, who administered it for herself and for her two children, the heirs of the deceased, as their tutrix. In the mean time, on the 28th of December, 1839, she presented a petition to the Court of Probates, to be confirmed as tutrix; and to cause an inventory and appraisement of the property to be made, and to call a meeting of her children's family, to deliberate and give their advice on their interest in the succession, and particularly, whether said succession should be accepted with the benefit of inventory, and on divers other subjects. This was done; and the family meeting determined that it should be taken with the benefit of an inventory; that the widow should take certain property at the estimation price; and further, that the partnership with P. E. Bossier should continue for two years longer, from the 1st of January, 1840. This was in accordance with a written agreement of the partners, signed by them on the 1st of August, 1839, in which they stipulate that, in case of certain circumstances happening in which the partnership might be considered as dissolved, it shall last for two years, longer after the 1st of January ensuing. All these proceedings were duly homologated.

On the 21st of May, 1840, P. E. Bossier, the surviving partner, made a settlement with the plaintiff, in consequence of which he gave her a note for $19,088, payable to her on demand, with eight per cent interest, *per annum*, from date until paid, "*pour valeur reçue, en sept billets signés par Bossier frères et par moi, retirés ce jour pour compte des mêmes*," and signed it: "*P. E. Bossier, chargé de pouvoirs pour Bossier frères.*"

A few months afterwards, the widow presented a petition to the Court of Probates, in which, among other subjects, she mentions the debt due to the plaintiff by the particular partnership existing between her children and P. E. Bossier, and represents that the payment of said debt could be delayed by giving said plaintiff a special mortgage on certain property that she described. She prays that a family meeting may be convened for that purpose. This was also done, and on the 6th of November, 1840, the family meeting declared, that "they are further of opinion that it would also be advantageous to the interest of the minors, and they so recommend, that their mother and tutrix be further authorized, and she is hereby authorized and empowered, to give and sign another mortgage, jointly with P. E. Bossier, in favor of the widow Buard, [the plaintiff,] to secure to her the payment of the sum due her by the firm of Bossier *frères*, on the property hereinafter described," &c. These proceedings were duly homologated; and, on the 10th of November, 1840, the act of mortgage was executed by the widow of Dassize Bossier and P. E. Bossier, as a security *for the payment of the note of* $19,088 *and interest*, and accepted by the plaintiff through her attorney in fact duly authorized for that purpose.

It further appears, that the widow of Dassize Bossier made a renunciation of her rights as widow in community, about the 19th of December, 1841; and we find that, on the 9th of March, 1843, she presented a petition to the Court of Probates, in which she states that the succession of her late husband is insolvent, and will not be able to pay its debts; and that she wishes a family meeting to be convened for the purpose of deciding, whether it would not be for the best interests of the minors to renounce the succession. This was again done, and the family meeting determined that, in order to facilitate the settlement of the estate by the creditors, it was the interest of the minors that they should renounce entirely and absolutely all claims, interest and pretensions whatever, in and to the succession of their father, said renunciation to be made, under the express condition and understanding, that the mass of the creditors of the successions of Jules V. Bossier and Dassize Bossier, formerly commercial partners under the name of J. V. Bossier & Co., should approve of the ac-

count rendered in the names of the two widows, each acting as administratrix, and that each administratrix, and their agent or attorney in fact, should be discharged from all and every liability resulting from their said administrations, &c. These proceedings were homologated; the renunciation of the heirs was made in due form immediately after said homologation; and it is admitted in the record, that the creditors of the commercial firm of J. V. Bossier & Co. complied with the conditions mentioned in the deliberation of the family meeting.

As to the account rendered by the widow of Dassize Bossier, and approved by the creditors, the record does not inform us of its contents; and, therefore it is not shown whether the mortgage given to the plaintiff was included in said account or not; and it seems, that those creditors were only those of the commercial firm of J. V. Bossier & Co., and not those of the partnership of Bossier *frères*, or of Dassize Bossier personally.

The present suit was instituted against the syndic of the vacant succession of Dassize Bossier, and against P. E. Bossier, on the note and act of mortgage above mentioned, for the purpose of enforcing its payment; but the latter having died during its pendency, the case was transferred to the Probate Court, where the Judge thereof having recused himself, it was ordered that it be referred back to the District Court, where it was revived against A. Lemée, as syndic of the succession of P. E. Bossier, deceased.

The defendant, as syndic of the estate of Dassize Bossier, denies all indebtedness to the plaintiff on the part of said succession; pleads that, if it ever was indebted, the debt was extinguished by novation and remission, by the transaction made on the 21st of May, 1840, between the plaintiff and P. E. Bossier; that the latter had no authority to bind the said succession or its property, as the same was vacant; that the acts of the tutrix, and advice of the family meeting, &c., are void and illegal; that the widow and the heirs have renounced the estate and community, whereby the same was always vacant; that they had no power to bind or incumber the same; that it was insolvent at the time of the death of D. Bossier; and that his heirs had no power to give a mortgage, note, or do any other act whereby a

preference could be given to one creditor over the others, &c. He also pleads the prescription of five years to the old notes mentioned in the petition. As syndic of the estate of P. E. Bossier, the defendant pleads the general issue.

It is perfectly clear that, as to the one-half of the claim and mortgage sued on, the succession of P. E. Bossier, deceased, who was originally jointly bound with his co-partner for the payment of the old notes, is liable to pay it; and that said mortgage is valid for said half.

But with regard to the other half, for which the insolvent estate of Dassize Bossier is sought to be made responsible under said note and mortgage, as being his portion of a debt due by the firm of Bossier *frères*, it will become necessary to examine divers questions raised by the pleadings, the first and most important of which brought for our solution, grows out of the defendant's plea of prescription to the old notes which are proven to have been the consideration for which the note sued on was executed by the surviving partner.

It is first proper to remark, that the partnership of "Bossier *frères*" was a particular one; it was contracted for the cultivation of a cotton plantation, and, therefore, its object was not for any business of a commercial nature. Civ. Code, art. 2806. In such partnerships, which are also called ordinary partnerships, (Civ. Code, art. 2707,) the partners are not bound, *in solido*, for the debts of the firm; and no one of them can bind his partners, unless they have given him power to do so, either specially, or by the articles of partnership, (Civ. Code, arts. 2843. 6 Rob. 351,) and each partner is bound for his share of the partnership debt. Art. 2844. The partners, therefore, in this case, were *joint debtors;* and we have recognized in the case of *Davis* v. *Houren et al.* 6 Rob. 261, that art. 3517 of the Civil Code, which says, that "the acknowledgment of a debt by one joint debtor, interrupts the prescription with regard to all the others, and even their heirs," was intended to apply to debtors *in solido*, according to the French text of the law—*Débiteurs solidaires;* and that, as the provision in the English text is at variance with the general provisions of the Code, in relation to the two classes of debtors, the discrepancy found in the English text of art. 3517, was an error of a transla-

tor or transcriber. It results from this interpretation of the law, with which we have no reason to be dissatisfied, that when the acknowledgment of a debt is made by a joint debtor, such acknowledgment does not interrupt the prescription with regard to the others. Each is bound for his virile share of the debt; and, therefore, each is at liberty to act for himself, and the effect of his acts cannot be extended to the benefit or prejudice of his co-debtors; so true is this, that the law has never intended that a suit brought against one of several debtors should interrupt prescription with regard to all, unless they be debtors *in solido*. Civ. Code, arts. 2092, 3517. It is clear, therefore, that any acknowledgment made by P. E. Bossier, of the debt originally due by the partnership to the plaintiff, could not interrupt prescription with regard to his portion; and, *a fortiori*, he had no right, either in the name of his said partner, or by any act of his own amounting to an acknowledgment of the debt by the partnership, to renounce the benefit of the prescription which his joint co-debtor might have acquired.

Were the old notes prescribed at the time P. E. Bossier undertook to settle the debt with the plaintiff, by giving a note by him signed in the name of "Bossier *frères*," for the sum of $19,088, for the security of which the mortgage complained of by the appellant was subsequently executed? We have already seen the periods at which the seven old notes were due; they were made payable to order, and became prescribed by the lapse of five years. Civ. Code, art. 3505. Thus it is established, that the one for $1000, was prescribed on the 6th of April, 1836; that the note for $1815 95, was extinguished by prescription on the 1st of May, 1837; that the one for $1065, was prescribed on the 11th of April, 1838; that that for $1961, was prescribed on the 1st of May, 1838; the one for $1080, on the 1st of July, 1838; the one for $2118, on the 1st of May, 1839; and the last one for $2287 50, on the 1st of May, 1840. The note sued on was executed on the 21st of May, 1840, after all the old notes had been prescribed.

But an attempt has been made to show that Dassize Bossier himself, before his death, had made such acknowledgments of the debt for which the new note and mortgage were given, as

to interrupt the prescription which was then running; and it behoves us to inquire into the evidence adduced for that purpose. Divers witnesses have been examined on this subject, and what do they prove? The first one, Chatargné, says: that *in a conversation with Dassize Bossier, the latter told him that he and his brother were indebted to their sister, Mad. Buard, and that, therefore, he was not afraid to be pushed by her; but he did not mention the amount.* The second, Janin, swears that, *previously to* 1833, *conversing with D. Bossier, the latter told him that they* (the two brothers) *had borrowed from their sister, Mad. Buard, the money with which they had purchased seven or eight negroes.* The third, L. D. Bossier, says that *the last conversation he had with D. Bossier on the subject of the debt due by the two brothers to Mad. Buard,* (witness having had frequent conversations with them about said debt before,) *was in the fall of* 1839, *a little before the death of Dassize, not more than six days before his death. In this conversation, witness said to Dassize, that he supposed Bossier frères owed Mrs. Buard about* $10,000, *to which Dassize answered, that he wished that was all, and that it was about double that amount. In this conversation Dassize said, that it was the intention of Bossier frères to give to Mrs. Buard a mortgage on their property to secure her the amount due her.* The fourth, S. Bossier, states *a conversation he had with Dassize, two or three months before his death, in which he told witness that he himself owed Mrs. Buard a large sum of money amounting, as witness thinks, to about* $25,000, *and that he had been negligent about making any settlement of it; he said also it was for money lent by Mrs. Buard to the firm of Bossier frères.* The fifth, Addlé, says that *Dassize told him they* (the brothers) *were in debt to Mrs. Buard, whom he called "petite sœur;" this was said in August, or September,* 1839, *and that it was for borrowed money.* The sixth, Faber, testifies that *Dassize told him that he had borrowed a large sum of money from his sister.* The seventh, Hyams, swears that *Dassize told him that the plantation of Bossier frères owed Mrs. Buard a considerable amount.* And the eighth, Hertzog, says that *he knew from Dassize him-*

self that he was indebted to Mrs. Buard, and does not know the amount.

By arts. 3486, 3516 and 3518, of the Civil Code, prescription ceases to run, whenever the debtor makes acknowledgment of the right of the person whose title he prescribes. These articles have been the subject of divers decisions of this court, in which we have had occasion to express our opinion on the nature of the acknowledgment required to interrupt prescription. In the case of *Carraby* v. *Navarre*, (3 La. 262,) this court held, that prescription is interrupted by the acknowledgment of the debtor, and that *his promise to pay* is an acknowledgment of *the debt*. It was also said, that a man cannot *renounce* the right of pleading prescription which may afterwards be acquired; but that by acknowledging *the debt, he may renew the obligation* and interrupt prescription, so as to make it run only *from the date of the acknowledgment*. In the case of *Conway* v. *Williams' administrator*, (10 La. 569,) we said, that the acknowledgment of a debt, in order to interrupt prescription, *must be specific:* an acknowledgment of *the debt*. In the case of *Tyson* v. *Magill*, (13 La. 145,) we held, that a conditional offer by a defendant, in a conversation with the plaintiff's counsel, that he would pay the note, if long time enough was given, did not amount to a *new promise*, so as to take the case out of prescription. In the case of *Hays* v. *Marsh*, (9 Rob. 26,) we thought that the statement made by the defendant, that he supposed he would have to pay the note presented to him by the plaintiff's attorney, in whose hands it was for collection, if the amount thereof could not be got out of the succession of his co-debtor, *in solido*, was such an acknowledgment of *the debt* as would interrupt prescription: the debtor's expectation of being obliged to pay, nay, his consent to pay, was in relation to a *specific debt*. And in the case of *Courtebray* v. *Rils*, (9 Rob. 512,) we again held, that the acknowledgment of a debt, in order to interrupt prescription, must be *specific*, and *such as to apply the evidence of it to a particular and specific debt*. We also said, that with regard to the renunciation of a prescription already acquired, such renunciation, being in the nature of the *renewal of an obligation*, must be specially proven. Dumoulin, quoted by Troplong, in his treatise on Prescription, No. 524,

says: "*Simplex recognitio non disponit, nec immutat statum rei.*" "*Il faut qu'une reconnoisance soit motivée et donnée en connoisance de cause,*" says Troplong. "*Si sit simplex recognitio, non immutatur qualitas rei.*" See also Troplong, Nos. 55 and 56, in which he says: "*Il faut que les actes dont on prétend induire une renonciation établissent la preuve irréfragable et non équivoque d'un abandon.*" Here it seems that Dassize Bossier, who is shown to have repeatedly acknowledged in his conversations with the witnesses, that he owed *a large sum* of money to his sister, did not make those acknowledgments with the intention of acknowledging said debt for the purpose for which those conversations are now used, to wit, *to interrupt prescription.* They were loosely made with regard to no fixed amount whatever; and no exact time or date is fixed by the witnesses, from which, after interrupting the prescription which was then running in consequence of the acknowledgment, it would begin to run, *de novo*, from the date of such acknowledgment. See the case of the *New Orleans Savings Bank* v. *Harper et al. ante*, 231. It is true, one of the witnesses, L. D. Bossier, proves that about six days before Dassize's death, the latter admitted that he owed about twenty thousand dollars, and that he and his brother intended to give a mortgage to secure it; but he did not allude to any particular debt, to any specific engagement; and if this fact were to have any weight, it could only apply to the last note, as all the others were already prescribed; and as this witness is the only one who establishes a fact in relation to a debt *to be secured by mortgage*, this would be insufficient to show such agreement, as the amount of the last note is over $500. 1 Rob. 335. Notwithstanding the number of witnesses who have proved that Dassize Bossier recognized himself *largely* indebted to the plaintiff, the acknowledgment was not *of a particular and specific debt;* it was not an acknowledgment *of the debt;* it was not made to benefit the plaintiff; it was the result of loose conversations with the witnesses, and is not such as to apply the evidence of it to any particular and specific debt, so as to permit the prescription to run again from the date of the interruption.

With this view of the question it is clear, that the debt for which the note and mortgage sued on were given, was entirely

prescribed before the date of the execution of the new note ; and that no one had a right to renounce the prescription already acquired, unless specially and sufficiently authorized to do so.

On this last branch of the question, it cannot be doubted that the estate of Dassize Bossier being insolvent, and taken under the benefit of an inventory, the creditors of said estate had a greater interest in it than the widow and heirs. Civ. Code, arts. 1051, 1056, *et seq.* It was subsequently renounced by the latter; and, according to art. 981 of the Civil Code, the effect of the acceptance going back to the day of the opening of the succession, that of the renunciation must be the same. Pothier, Propriété, says : " *Lorsque l'héritier à qui une succession a été déférée y renonce, il est censé n'avoir jamais été saisé des biens de cette succession.*" No. 248. Toullier, vol. 4, No. 342. And it is a well known rule, that the privileged and mortgaged rights of creditors are invariably fixed at the time of their debtor's death. Civ. Code, art. 3327. Toullier, vol. 4, No. 392. *Bethany* v. *His Creditors*, (7 Rob.) *Pelié et al.* v. *Citizens Bank of Louisiana*, (11 Rob. 248.) It follows, therefore, that the rights of the creditors could not be changed by the acts of the widow and heirs; that no prescription could be renounced by them, to the prejudice of the other creditors; and that as the syndic represents here, all the creditors who have an interest in acquiring and maintaining the prescription which had run out at the time and after the opening of the succession—" *ayant intérét à ce que la prescription soit acquise*," (Civ. Code, art. 3429,) he has a right to plead it, even in case the person claiming the estate at its opening, should renounce such right of prescription. The partnership may have been considered by the widow and heirs, and by P. L. Bossier, as continued by the agreement of the parties; but they had no right to continue it without the consent of all the creditors, since the succession was insolvent, and administered under the benefit of an inventory. It was dissolved by the death of Dassize, (Civ. Code, art. 2851. Pothier, Société, No. 144,) and it is well settled, that after the dissolution of a partnership, none of the members can bind the others, or the firm, for the payment of a debt which has been prescribed, any more than they can create an entirely new obligation. *Davis* v. *Houren et al.* 6 Rob. 256.

We are, therefore, of opinion, that the plaintiffs cannot recover as to the succession of Dassize Bossier, represented by the defendant as its syndic.

It is, therefore, ordered and decreed that, with regard to the liability of the succession of Dassize Bossier, deceased, to pay jointly and for one-half, the amount of the note sued on, the judgment of the District Court be annulled, and reversed; and that ours be in favor of the defendant, its syndic and appellant, annulling the note and mortgage sued on as if the same had never been executed as to the said succession, with costs in both courts. And it is further ordered and decreed, that, as to the succession of P. E. Bossier, the judgment appealed from be affirmed, with costs.

Hertzog, *Tuomey* and *J. Taylor*, for the plaintiff.

Roysdon, *Sherburne* and *J. B. Smith*, for the appellant.

ARCHIBALD P. WILLIAMS *v.* VALENTINE BOOKER and others.

APPEAL from the District Court of Concordia, *Curry*, J.

SIMON, J. The plaintiff represents himself to be the owner of several tracts of land, to which he claims title as derived by purchase from the government of the United States; and he prays that the defendants, who have unjustly and illegally taken possession of them, be ousted or evicted therefrom, that the title to said lands be adjudged to be in him, and that he be allowed $5000 damages, &c.

The defendants first pleaded the general issue, and further specially denied the legality and sufficiency of plaintiff's title, on the ground, that the United States were never legally divested of their title to the lands claimed, as said lands never were offered at public sale, &c. They pray that, in case of eviction, they may be allowed the value of the improvements, &c., which they have placed on the lands, which they estimate at the sum of $2000, to be paid to each of them, (four defendants,) by the plaintiff, previous to his being put in possession of the land.

The judgment was rendered below in favor of the plaintiff, or-

dering three of the defendants to quit the premises and move off the plaintiff's land within ten days after the notification of the judgment; rejecting the defendants' claim for improvements, except so far as to mitigate the damages, and condemning each of them to pay the plaintiff the sum of five dollars damages; and from this judgment, the three defendants appealed. A judgment of nonsuit was entered as to the fourth defendant.

The evidence shows, that the plaintiff is really the owner of the tracts of land by him claimed; that he purchased them from the United States as far back as 1833; and that having duly entered the lands, and paid the price thereof, he received patents from the government.

The defendants have not attempted to set up any title to the land sued for, but it is shown by the evidence, that three of them have occupied the same and been living on it for a considerable time. During their possession, they made improvements on the land, cultivated several portions thereof, and were in the habit of cutting and selling wood thereon; and it is pretended by their counsel that, never having had any notice of plaintiff's title till the institution of this suit, and having possessed the property under the hope or expectation that, being a part of the public domain, they would be entitled to purchase it from the government by right of settlement or pre-emption, they were possessors in good faith, possessing by the authority and approbation of the supposed real owner, not knowing he was divested of title. They contend that, being possessors in good faith, as against the plaintiff, they are entitled to be paid the value of all their improvements, and are not bound to account for the value of the fruits and revenues till after the commencement of the suit.

This case presents pretty much the same features as that of *Pearce et al.* v. *Frantum*, (16 La. 414,) and must be governed by the same rules. Indeed, the facts of the case are very similar; and, as in the case quoted, the only question to be decided here relates to the right of the plaintiff to recover the rents and profits by him claimed as damages, and to the pretended right of the defendants to be paid for the value of their improvements. There is no proof in the record that the defendants ever had any direct notice of the plaintiff's title till the institution of this suit. Their

long possession had the effect of their being legally considered as owners of the property which they possessed, so long as it was not reclaimed by the true owner; (Civ. Code art. 3417;) and we are not prepared to say that, under the circumstances disclosed in the record, they should be considered in bad faith so far as to be deprived of the right of being reimbursed for useful improvements and expenses put on the land, by which the property may have been made more valuable to the plaintiff. The amount which the defendants may be entitled to, cannot however exceed *the increased value of the property*, considering its relative situation and condition with regard to the owner, and must be compensated by the amount of rents and profits which they may be found to owe to the plaintiff since the institution of this suit.

This case being governed entirely by the same rules and principles established in the case above cited, and in that of *Kellam* v. *Ripey*, (3 Robinson, 138,) it is unnecessary for us to enter into any further discussion of the rights of the parties. On the part of the plaintiff, it is clear that he is entitled to be restored the fruits, which the defendants reaped after the institution of this suit; and on the part of the defendants, they have a right to be reimbursed for the value of their improvements, according to the increased value of the property.

We have been called upon to liquidate the balance which may be due to either of the parties; but although the record contains some evidence showing the value of the clearings made by the defendants on the land, and of the buildings put thereon, and of the yearly rent of the land; we think that it might be made more satisfactory, and that it would be difficult for us to strike any balance. There is no sufficient proof of the value of the improvements *according to the enhanced value of the land*, and we cannot take the estimates of the witnesses, so far as they go, as a true and correct criterion; and it seems to us, that justice requires that this suit should be remanded to the lower court, for the purpose only of liquidating before a jury, the balance which may be due to either of the parties, according to the principles above recognized.

The appellee has complained in his answer that the judgment appealed from does not decide the title to the land in question to be in him, and in this respect he has prayed that said judgment

be amended. This, we think, he is entitled to, as the Judge, *a quo*, appears to have overlooked this part of the plaintiff's prayer as contained in his petition.

It is, therefore, ordered and decreed, that with regard to defendants Booker, Jarvis and Hicks, the judgment of the District Court be annulled and reversed; that the plaintiff recover, and be quieted in his title to, the tracts of land claimed and described in his petition; that the case be remanded to the District Court for the purpose only of ascertaining the value of the improvements, and the amount of fruits, or rents and profits, according to the principles above recognized; that, in the mean time, no writ of possession be issued; and that the costs of the appeal be paid by the plaintiff and appellee.

Evans and *A. N. Ogden*, for the plaintiff.

Stacy, for the appellants.

SAME CASE.—ON A RE-HEARING.

A possessor in bad faith cannot claim any thing for improvements made by him on the premises, where their value does not exceed that of the fruits and revenues received by him. Such a possessor has no claim to the fruits and revenues. C. C. 3416.

Evans, for a re-hearing.

SIMON, J. We have been called on by an application for a re-hearing on the part of the plaintiff and appellee, to reconsider this case, and to put an end to the controversy. This we have been prompted to do, as, after a careful re-examination of the record, we have convinced ourselves that the defendants and appellants are not entitled to the indulgence which we thought could be extended to them, though possessors in bad faith to a certain extent, under the principles recognized in the cases of *Pearce et al.* v. *Frantum*, (16 La. 414,) and *Kellam* v. *Ripey*, (3 Rob. 138,) on which our opinion in this case was based. On a closer scrutiny of the evidence, we have been able to ascertain that the defendants were mere trespassers on the plaintiff's land, and that the definition of what constitutes a possessor in bad faith contained in art. 3415, of the Civil Code, was fully applica-

ble to them; and that therefore, they cannot be entitled to the rights allowed by law to a possessor in good faith. Civ. Code, art. 3416.

We said in our first opinion, that the record contained no proof of any direct notice of the plaintiff's title having been given to the defendants before the institution of this suit; but we think that it may be implied, and that they were sufficiently made aware of the existence of said title from the facts, that the plaintiff's receipts and certificates were recorded in the office of the Judge of the parish of Concordia, on the 28th of May, 1839, (this suit was instituted on the 7th of January, 1840;) that the public sale of the land by the government of the United States to the plaintiff was made at Monroe, Ouachita; that the records of the purchase by said plaintiff are deposited in the Land Office at the same place, where the defendants might have seen them, if they ever intended to make application to purchase the same land as part of the public domain by their right of settlement or pre emption, as alleged in their answer; and that one Francis Routh, who is shown by the testimony to have been living on said land for the plaintiff and as his agent, since 1838 or 1839, sent a man to give them notice to leave the premises in the year 1839 or 1840. The notice which the defendants had was not direct, it is true; but we think it was sufficient to inform them, that the plaintiff was the owner of the property, and that, well knowing they had no title to it, it was their duty to abandon it to its lawful proprietor, without the necessity of a suit to compel them to do so.

Under the circumstances of the case, and without lessening the weight which we have given to the authority of the legal principles recognized in the two cases above quoted, and by which, we were under the impression that the rights of the parties to this suit were to be governed, we are of opinion, that the judgment appealed from, which considers the defendants as mere trespassers, is correct; that the wood they have cut on the land and sold for their benefit, the destruction of the timber, and the use of the premises for several years, are a sufficient compensation for their improvements; and that the defendants should be ordered to quit said premises, and move off the plaintiff's land,

within ten days after the filing of our mandate in the court below.

It is, therefore, ordered and decreed, that our former judgment, so far only as it orders and decrees, that the plaintiff recover and and be quieted in his title to the tracts of land claimed and described in his petition, be maintained; that the other dispositions of our former judgment be set aside, and that the judgment appealed from, be affirmed in all respects, with costs in both courts.

WILLIAM J. CALVIT and others, Heirs of Mary Calvit, deceased, *v.* CHARLES MULHOLLAN and another.

Under the Code of 1808 a succession was vacant, when no one claimed possession of it as heir, or under any other title. Book 3, tit. 1, art. 118. *Aliter* under the Civi. Code of 1825. By this Code the heir becomes seized of the succession by the mere operation of law, from the moment it is opened by the death of the ancestor, before taking any steps to put himself in possession, or expressing any willingness to accept, and even though ignorant that the succession was opened in his favor. C. C. 934, to 939.

Prescription ran against a vacant estate under the Code of 1808. Book 3, tit. 20, art. 62. The law is the same under the Code of 1825. Art. 3492.

Plaintiffs claimed, as heirs of their mother, one-half of a tract of land belonging to the community of *acquêts*, sold by the husband after the death of the wife. The sale was made while the Code of 1808 was in force. The husband after the wife's death became the natural tutor of the plaintiffs, then minors, and retained the community property in his possession, but took no steps to open the succession of the wife, and no one claimed possession of it either as heir or under any other title. Defendants pleaded the prescription of ten years. *Held*, that the succession being, according to the Code of 1808, a vacant one, prescription ran against the estate, and in favor of the defendants from the date of the sale till the promulgation of the new Code on the 20th June, 1825; that after its promulgation the succession ceased to be vacant, the heirs becoming from that moment seized of it; that no prescription could run against such of the heirs as were then minors; and that to ascertain whether the action of any heir was prescribed by the lapse of ten years, the time between the sale and the promulgation of the Code of 1825, should be added to that between the majority of the heir and the institution of the suit. C. C. 934 to 939, 3488. 4492.

APPEAL by the plaintiffs from a judgment of the District Court of Rapides, *King*, J.

Simon, J. We are called upon to reverse a judgment rendered in favor of the defendants, by which they are quieted in their title to, and possession of, a tract of land claimed of them by the plaintiffs in the right, and as the legal heirs and representatives of their deceased mother.

The facts of the case are these: Mary Mayes, wife of Anthony Calvit, died in May, or about the first of June, 1816: she left four children, the issue of her marriage, to wit: William J., Elizabeth G., James A., and Coleman W. Calvit, who are the plaintiffs in this cause. Among the property which the spouses possessed at the time of the dissolution of their marriage, there was a tract of land of 340 superficial *arpents*, being six *arpents* front on both sides of bayou Bœuf, having on the east side a depth of 40 *arpents*, and on the west side such a depth as to make 100 superficial *arpents*, which was acquired during the existence of the marriage, and was community property. Anthony Calvit, after the death of his wife, became the natural tutor of his children, and continued to keep the community property in his possession, without taking any step, for aught it appears, to open the succession of his deceased wife, in the name of his children, who were all minors, and placed by law under his natural tutorship. It is not shown that he ever made any inventory; and if any proceeding ever took place in relation to the estate of his wife inherited by the plaintiffs, none could be found in the Parish Judge's office, or any where else.

It further appears from the evidence, that Anthony Calvit, who was only entitled to one-half of the tract of land above described, sold the whole of it, on the 2d of March, 1820, to one Davis, under whom the defendants claim through divers mesne conveyances; and that said defendants, as well as those under whom they claim, have always peaceably and uninterruptedly possessed this property from the date of the act of sale from Calvit to Davis, up to the 23d of April, 1838, when the present suit was instituted to evict them from an undivided half thereof.

The defendants rely upon the prescription of ten years, which they contend was acquired by them, and by their authors, against the succession of the plaintiff's mother, considered *as a vacant estate*, long before the institution of this suit; but, in the event

of eviction, they pray that they may be compensated for the value of improvements, &c., put upon the land. All the successive vendors of the property in dispute, were also regularly called in warranty, up to Anthony Calvit himself, who joined issue by denying all the allegations contained in the plaintiffs' petition.

The record shows, that James A. Calvit was born in the year 1800; he, therefore, became of age in 1821. Elizabeth G. Calvit was born in 1804; she became of age in 1825. James A. Calvit was born in 1813; he became of age in 1834. Coleman W. Calvit was born in 1815, and he became of age in 1836. It is clear then, that the prescription has run against the two eldest, as more than ten years had elapsed since their majority, before the institution of this suit. But is it so with regard to the two other plaintiffs, who only became of age in 1834 and 1836?

It is contended by the defendants' counsel that, according to the provisions of the Civil Code of 1808, under which the succession of the plaintiff's mother was opened, said succession was to be then considered as *a vacant one*, as it was claimed by no one of her heirs; and that, in such a case, prescription being by law allowed to run against a vacant estate, such prescription was acquired by the defendants, or those under whom they held, as to all the plaintiffs, long before the institution of this suit. The counsel relies on the case of *Davis* v. *Elkins*, (9 La. 135,) to show that Mary Mayes' succession could not be considered in any other light but as a vacant one, against which prescription runs under the old Civil Code, as well as under the present Civil Code, art. 3492.

We are not disposed to contest the correctness of the jurisprudence established on this subject by our predecessors, under the provisions contained in the old Civil Code. We shall even give to the defendants the benefit of the time which may have run between the sale made by Calvit on the 2d of March, 1820, and the 20th of June, 1825, which is the date of the promulgation of the present Civil Code, so as to allow them five years, three months, and eighteen days, as so much time acquired under the old Code, by virtue of the right of prescription then running against a vacant estate. But the question presents itself: did not the pro-

visions of the law, as existing under the old Code on this subject, undergo a material change by those enacted in the present Code; or, in other words, could the succession of Mary Mayes be yet considered as a vacant one, after the promulgation of the new Code? If not, the time necessary to acquire prescription, not having been completed under the former law, became suspended by the new law, and could not continue to run until the plaintiffs had attained the age of majority.

On this subject, we take it to be a true and correct doctrine, that the time which precedes the change of legislation, or the altering of the period of prescription, should first be reckoned according to the ancient law, and that after the expiration of the suspension operated by the new provisions, it should be followed according to the new law. 6 La. 674. 11 La. 59, 61. For instance: suppose that under a former law, prescription was permitted to run against minors, but that, by a subsequent law, such prescription should be suspended during minority, and could only begin to run from the time of majority, could it be doubted that, in such case, the new provision would have its effect so far as to suspend for the future, the time necessary to acquire prescription between the action of the new law and the age of majority? Surely not; the right or time previously acquired would not be destroyed, for, on the contrary, it should be added to the period acquired after majority to complete the prescription under the new law. If this doctrine be correct, it is obvious that if, by the change of legislation, the succession of Mary Mayes ceased to be a vacant estate, the prescription already commenced became suspended in favor of her minor heirs, and could only continue to run after their age of majority.

It is proper to remark, that the case of *Davis' Heirs* v. *Elkins et al.* (9 La. 135,) was decided entirely on principles established in the old Civil Code. So was the case of *Poultney's Heirs* v. *Cecil's Exr.*; (8 La. 411;) but the jurisprudence of this court, under the provisions of the present Civil Code, appears to be so well settled on the question under consideration that it can hardly be considered now as a new and an open one. In the case of *O'Donnald* v. *Lobdell*, (2 La. 300,) this question underwent a thorough examination; and it was there held that, under

the express provisions of the present Code, (which we do not deem necessary to review much at length,) the succession is represented by the heir *who is seised of it, from the moment it is opened.* Civ. Code, arts. 934, 935, 936, 937, 938, 939. In every one of these articles, our law recognizes that a succession is acquired by the lawful heir, *immediately after the death* of the person, to whom he succeeds; that this right is so acquired *by the operation of the law alone, before he has taken any step* to put himself in possession, or *has expressed any will to accept it;* thus, the right of possession which the deceased had, continues in the person of the heir, as if there had been no interruption, and independently of the fact of possession, and such right continues in the person of the heir, with all its defects and its advantages, as the change in the proprietor produces no alteration in the nature of the possession.

Under a correct application of these provisions of our laws to the present case, how can it be said that the estate of Mary Mayes was a vacant one? Can it be pretended that a curator could have been appointed to the succession, as if it had been vacant? Were not the heirs in possession of the property in dispute? Was not said property in the possession of their natural tutor, who necessarily held it for them, and in their names? To these questions, it is answered, that they took no step to claim the estate, and that, therefore, by the terms of art. 1088, of the Civil Code, it was vacant. The minor heirs of the deceased could not act by themselves; they could only act through and by their tutor; it was his duty to take possession of the effects of the estate for them, and to preserve them for their benefit; and so he did, so far as to put himself in possession of the property; but his not preserving it to restore it to his children at the age of their majority, cannot turn to their prejudice, so as to deprive them of their rights as heirs of their mother. But the law says in positive terms, that it is not necersary to take any step to claim the succession, or to express any will to accept it; (Civil Code, art. 935;) and that the heir succeeds to the deceased from the instant of his death, and transmits his rights to his own heirs, although he himself have not accepted it, and even *in case he was ignorant that the succession was opened in his favor.* Civ.

Code, art. 938. This doctrine was also fully recognized in *Robin* v. *Castille*, (7 La. 295,) and in *Addison* v. *The Savings Bank*, (15 La. 527.)

But it has been urged that, by art. 940 of the Civil Code, the right of the heir to the succession *is in suspense until he accepts or renounces;* and hence, it is argued, that his right is incomplete, that is to say, that he is not vested with the inheritance so as to entitle him to keep it, unless he declares that he accepts it absolutely. This article immediately follows those which are the basis of our opinion, and which declare, that the heir acquires the succession *by the mere effect of the law;* and we cannot suppose that the law-maker ever intended to destroy the effect of the previous provisions, particularly as art. 940 recognizes again in positive terms that, "the succession is acquired by the heir from the moment of the death of the deceased." We understand this article to mean that, although the heir represents the deceased as fully as if there had been no interruption, his right to the inheritance shall only become definitive after he has accepted it, but that he shall also be at liberty to reject it. This is only a modification of the exercise of the right; it is established not only for his benefit, but also for that of the creditors of the succession; but the right exists; it is acquired by the heir who represents the deceased; and if it is suspended, it is only with a view of compelling him to declare, within the legal delays to deliberate, whether he is determined to keep the estate or abandon it. Again, the succession is represented by the heir, and therefore it cannot be vacant. There is a vast difference between an estate represented by the heir, whose right to it is only in suspense, and the fictitious being which was created by the old Civil Code, but which terminated its existence by the enactment of the present Civil Code. With regard to minors accepting or renouncing a succession, it is well known, that this cannot be done by the tutor alone, and that a succession can never be accepted for them but with the benefit of inventory; (Civ. Code, arts. 345, 346;) and it seems to us, that if the tutor fails to take the advice of a family meeting, the minors cannot suffer from his negligence.

In order to strengthen our position, it may be proper to re-

mark, that it is not shown in this case that Mary Mayes owed any debt at the time of her death, nor that any creditor was interested in causing an inventory to be made and an administrator to be appointed. Now, our law, (Civ. Code, art. 1029,) has so far provided for the case where the heirs do not take the necessary measures to cause the seals to be affixed to, and an inventory made of, the effects of the succession, that it has allowed to the creditors the right to cite the heirs before the Judge, in order to oblige them to declare whether they accept or renounce the succession. The law has not said that the estate shall be considered vacant. On the contrary, the heirs, by the very reason that they are entitled to the succession by the operation of the law alone, must be called upon to declare their intention as to accepting or renouncing the estate which they have acquired. In the case of *O'Donnald* v. *Lobdell*, already cited, this court said: "It is only after the heir has been called by the creditors to renounce, or take the inheritance, that an administrator can be appointed." *A fortiori*, would it have been illegal and irregular to appoint a curator to the estate of Mary Mayes, as to a vacant one. This is in accordance with the French jurisprudence on this subject. Rogron, note on art. 811 of Nap. Code. 4 Toullier, No. 396. 4 Duranton, (Brussels ed.) No. 60, 61, 62, 63, 64.

In coming to the conclusion that the succession of Mary Mayes never was, under the new Code, a vacant estate against which prescription could run, or that it had ceased to be such at the time of the promulgation of the present Civil Code, at which time the heirs became seised of the inheritance by them acquired *by the mere operation of law*, we give full effect to the provision of our law which says, that "minors cannot be prescribed against, except in the cases provided by law." Civ. Code, art. 3488. Indeed, if such prescription had begun to run against them under the old law, under the supposition that the estate of their mother had become vacant, it is clear that it was suspended by the promulgation of the new Code; and that if, from the time of their majority, up to the institution of this suit, there has not been a sufficient length of time to complete the prescription, the claim of two of the plaintiffs to their respective portions of the

tract of land sold by their father, must prevail. James A. Calvit, according to the evidence, became of age in 1834, and Coleman W. Calvit attained the age of majority in 1836; the time from these periods up to the 23d of April, 1838, is about four years for one, and two years for the other; and added to the five years, three months and eighteen days, which had run under the old Code, is not sufficient to complete the prescription of ten years.

With this view of the question, we are of opinion that the claim set up by William J. and Elizabeth G. Calvit, is prescribed; but that James A. Calvit and Coleman W. Calvit are entitled to recover respectively one undivided eighth of the tract of land described in their petition, which makes, for both, one-fourth of the whole tract.

With regard to the question of improvements; we think that as the case stands, we cannot take it under our consideration. It is true, that the record contains evidence upon this subject which would, perhaps, be sufficient to enable us to liquidate the amount due to the parties respectively for the value of their improvements, and for the reimbursement of the rents and profits; but as this part of the case was not acted upon by the court, *a qua*, we cannot assume original jurisdiction; and, at any rate, we think it is proper that the case should be remanded for that purpose, as it must, also, be sent back, for the purpose of settling the question of warranty resulting from the eviction, between the different warrantors called in this suit.

It is, therefore, ordered and decreed, that the judgment of the District Court, so far as it rejects the claim of the plaintiffs, James A. Calvit and Coleman W. Calvit, be annulled and reversed; that said James A. and Coleman W. Calvit do recover of the defendants, each, one undivided eighth of the tract of land described in their petition; that they be quieted in their title to the said undivided eighth, hereby decreed to them respectively, as against the defendants, or any other person claiming through or under them; and that with regard to the questions of improvements, and rents and profits, presented by the pleadings, so far as James A. and Coleman W. Calvit are interested, and to the question of damages between the warrantors, this case be re-

manded to the lower court, to be proceeded on according to law. And it is further ordered, that with regard to William J. and Elizabeth G. Calvit, the judgment appealed from be affirmed; one-half of the costs in both courts to be paid by the defendants and appellees, and the other half to be borne by William J. and Elizabeth G. Calvit, two of the appellants.

SAME CASE.—ON A RE-HEARING.

The lapse of the time necessary to prescribe, vests a right in the party in whose favor it has run. *Aliter*, where but a part of the time has elapsed. No right is vested but where the prescription is completed; until then it may be destroyed by law, or be suspended, or interrupted by circumstances.

Where plaintiffs claim, as heirs of their mother, one-half of certain community property sold by the husband after the death of the wife, and the vendee proves that the price of the property was applied to the payment of the debts of the community, he will be entitled to the reimbursement of the amount so paid for its benefit, in proportion to plaintiffs' interest in the community.

Brent and *O. N. Ogden*, for a re-hearing. It is admitted that the succession of plaintiffs' mother was a vacant one according to the Code of 1808. Book 3, tit. 1, art. 118. The character of the succession was determined by that Code; (6 La. 441;) and no posterior legislation could destroy or impair rights already acquired by third persons. The purchaser under whom defendants claim, acquired his title, such as might serve as the basis of prescription, more than five years before the promulgation of the Code of 1825; and prescription had run for that period against the estate, under the law in force at the time of opening the succession. In the case of *Davis* v. *Elkins*, 9 La. 145, Mathews, Judge, says: "It may also be seriously questioned whether any provisions of posterior laws can justly be so construed, in regard to prescription, as to produce an abrogation of the rules previously established for the acquisition of property."—"If a right has once begun to exist, although it may be inchoate and not perfected, we are not able to see how, by any rational interpretation, consistent with just rules on this subject, a subsequent law can be made so to operate as to destroy it." The opinion pronounced in this case, is at war with the decisions in the cases of *Poultney's Heirs* v.

Cecil, (8 La. 411,) and *Davis* v. *Elkins*. All the points on which the plaintiffs rely in this case, were raised in that of *Davis* v. *Elkins*, and deliberately overruled. The facts, that the prescription of ten years was not completed under the old Code—that the Code of 1825 introduced new rules—that by the last, the heir was given seisin of the succession from the moment of its being opened, were all noticed by counsel and commented on by the court; and all the articles of the Code of 1825 were compared together, and critically examined.

But the succession of the plaintiffs' mother continued to be a vacant one after the promulgation of the Civil Code of 1825, when tested by the provisions of the new Code itself. This Code, art. 1088, declares, that "a succession is called vacant, when no one claims it, or when all the heirs are unknown, or when all the known heirs renounce it." The record shows, that the succession of the plaintiffs' mother had not been claimed by any one when this suit was instituted. The principle asserted by the court in the decision in this case, leads to the inevitable conclusion, that there can be no such thing as a vacant succession, as no man will ever die without leaving heirs in some quarter of the globe; or as Judge Mathews expresses it in the case of *Davis* v. *Elkins*: "If the heir, whether known or unknown, absent or present, has by mere operation of law full seisin of the succession, both as to right and possession, how is it possible that there can be any such thing as a vacant estate in this country?" The law should be so construed, *ut res magis valeat quam pereat*. The reasoning of Judge Mathews, in the case just quoted, reconciles the apparent conflict between arts. 934, 936, and arts. 970 and 1088, by calling in art. 940, which declares the rights of the heir to be suspended, until he decides whether to accept or reject the succession. The law gives the heir seisin of the succession from the moment of its being opened, but this right is in suspense until his acceptance is declared.

It is stated in the opinion of the court, that a curator could not have been appointed to the succession of the plaintiffs' mother, because the father and natural tutor was in the possession of the property in dispute. But the property in dispute and the "succession," are different things. If the succession was a vacant

one, (no one claiming it,) a curator might have been appointed, though a portion of the property were in the possession of the natural tutor of the heirs. Civ. Code, art. 1090. But the succession was a vacant one for another reason—the heirs were *unknown.* There is no evidence that the heirs were known till the institution of this action. When the law speaks of heirs being known, it refers to a *judicial knowledge* of them. If the heirs do not make themselves known as such, *eo nomine*, the law regards them as strangers to the succession. No one is compelled to accept a succession. Civ. Code, art. 970. But it is stated by the court, that the plaintiffs were minors, and that the omission to comply with the formalities necessary to enable them to accept the succession, cannot operate to their injury. This consideration would have weight, if the law had made any exception in favor of minors. None such exists. The Civil Code, art. 1088, declares in positive terms, that "the succession is vacant when nobody claims it;" there is no provision that it shall not be so considered where the heirs are minors.

In the case of *Poultney's Heirs* v. *Cecil*, (8 La. 411,) the action was instituted in December, 1832, and the heirs were minors, who, pending the suit, accepted the succession with benefit of inventory. The first question examined in that case was, whether the succession was vacant, or not. It was decided to be vacant. Bullard, J., in delivering the opinion of the court, said: "These minor heirs, without acceptance, must be considered, (saving the right to accept at a future time,) as strangers to the succession, and the succession itself as vacant, and not represented by an heir." The same Judge says further; (p. 414:) "We have high authority for assuming as a principle, that the retroactive effect of an acceptance which is in truth but a fiction, should not be extended so as to operate to the prejudice of the rights of third persons *previously* acquired." That is, until an actual acceptance, none shall be considered to have been made, so far as the rights of third persons, acquired in the intermediate time, are concerned. The succession of the plaintiffs' mother, should be regarded as a vacant one, until actually accepted by the heirs; and the defendants having, before any such acceptance, acquired the prescription

of ten years against it, such acceptance cannot operate to destroy a right thus previously acquired.

Should the opinion pronounced be maintained, an opportunity should be afforded to the defendants of showing, on a new trial below, that the price received by the plaintiffs' father, was applied to the payment of the debts of the community, existing between him and their mother, in whose right the petitioners claim.

Simon, J. The principal argument on which a re-hearing was asked and allowed in this cause, is based on the position taken by the defendants' counsel, that the character of the succession of the plaintiffs' mother, should be exclusively determined by the law in force at the time of its opening; that it was then a vacant one, and that it must continue to be so under the new Code, as it was under the old one. And hence it has been ably and strenuously contended, that the defendants had acquired certain rights against the succession, which the new law could not affect; and that those rights, consisting in being entitled to complete the prescription which had begun to run under the old Code, such prescription, if completed under the new Code, should avail the defendants against heirs who have not accepted the succession of their mother, until long after said prescription was acquired. We are free to confess, that these arguments had shaken our opinion, and that their plausibility made us doubt for some time the correctness of our previous decision; but we have found, after a close re-examination of the question, that they were more specious than solid, and that it was not difficult to demonstrate it.

The counsel has greatly misunderstood us, when he says that our construction of the law of 1825, goes so far as to give to the heirs the seisin of the succession, *from the moment it was opened* under the Code of 1808. On the contrary, we took for granted, since it had been so decided by this court in the case of *Davis' Heirs* v. *Elkins*, (9 La. 145,) that it was vacant until the Code of 1825, and we gave his clients against two of the plaintiffs whose claim was defeated thereby, the benefit of the time which had run from the date of the sale from Calvit to them; (2d of March, 1820;) but considering the prescription as suspended, during all the plaintiffs' minority, from the effect of the new enactments on their rights, permitting it to continue to run and be

completed, after their attaining the age of majority. The defendants had acquired no right to the prescription contended for, at the time of the promulgation of the new Code; and how can such right, when not existing, be affected by our construction of the new law, when at the time of its enactment, it could have been interrupted by other causes. Troplong, in his treatise on Prescription, No. 1075, says: "*En principe, une prescription commencée ne forme pas un droit éventuel acquis; en effet, si on la considère comme moyen d'acquérir, elle est si peu un droit acquis qu'elle peut être à tout moment effacée par une interruption; elle n'est encore qu'un germe facile à détruire, qu'une espérance sujette à déception.*" Here, it is true the defendants had commenced their prescription under a law which would have perhaps permitted them to complete it, if it had not been changed; that is to say, if the succession of Mary Mayes had continued for ten years to be considered as vacant, and if it had not been suspended by the minority of her heirs, to whom the new law gave an immediate right to be seised of it, and to be viewed as the owners of the property which she had left at the time of her death. But this is not giving to the new law a retroactive effect; this is not affecting rights previously acquired. The prescription which had commenced, was not, before the new law, running against the heirs; *it was against the presumed vacant estate* of their mother; and when, from the provisions of the new Code, it ceased to be vacant, could the prescription continue to run? Surely not, for it would then have run against minors, vested with the seisin of the estate of their parent. It seems to us perfectly clear that, from the time the law was altered, so as to change the nature of a succession, and devolve it upon the legal heirs without any of the formalities previously required to claim or accept it, and without affecting any legal right previously acquired by third persons, such succession could validly change its denomination, and from a vacant one become at once a succession *ab intestato*. Here again, no right had been acquired; for it cannot be pretended that the right to a part of the time necessary to prescribe, can be considered as a vested right. Such right is only vested when the prescription is completed; and until then, it may be destroyed by law, or by circumstances amounting to a sus-

pension or interruption. The time for prescribing may be shortened or lengthened, as the new law may provide; and surely it cannot be contended, that such a law would have a retroactive effect, if lengthening the time necessary to prescribe under a former law, it subjected the possessor to a longer period of possession, than was required under the old law. No right being acquired, none would be affected; and the possessor, having the benefit of the time which elapsed under the old law, would be obliged to complete it according to the new law. 6 La. 674. 11 La. 59, 61.

But we cannot understand how it can be urged, that the defendants' right to a prescription which was not acquired at the time of the promulgation of the new Code, was affected by the enactment of its provisions. It is well known, that a vacant estate declared to be so at the time of its opening, is always subject to the contingency of *its ceasing to be vacant*, when the heirs of the deceased claim it, and sue the curator to be put in possession of it, and to compel him to account; and if such heirs are minors, could a prescription commenced against the estate, while it was vacant, continue to run against them? Certainly not; it becomes suspended during their minority, (Civ. Code, art. 3488,) and may only continue to run after they have attained the age of majority. Here, the new law has done nothing but what the persons themselves, being minors, would have been enabled at any time to do, if they had been under the tutorship of a person well disposed to take care of their interest, and to administer their estate in a proper manner. The rights of the heirs were not changed, nor in any way bettered, nor extended by the new law; they were, under both laws, vested with the legal and incontrovertible right of inheriting the succession of their mother, and of claiming her estate as her heirs; and the only change which the new law made was, that under its provisions, *the heirs became seised of it, by the mere operation of the law*, and *before their taking any step to put themselves in possession, or expressing any will to accept it*, (Civ. Code, art. 934, *et seq.*) Whilst under the former law, their failing to claim it, caused it to be considered as a *vacant succession*, though the heirs, all minors, were present in the State, and incapable of acting by themselves, and though

their tutor was in possession of their property, as being derived from the estate of their mother, and was thereby enabled to dispose of it to their prejudice; because, forsooth, the succession of Mary Mayes being vacant, the purchaser would acquire a good title by prescription, before the minors could have attained the age of majority. So, however, it has been decided by this court in the case of *Davis* v. *Elkins*. But as it is not our object to controvert that decision, or to question its correctness, in this case, we shall leave it undisturbed, however unjust it may be in its consequences, until we have occasion to prevent its direct application, if we should be of opinion that it is unfounded in law and in equity. It is sufficient for us here to say, that the estate of Mary Mayes *ceased to be vacant* after the enactment of the new Code, in the same manner as if it had been claimed by her heirs; that those heirs became seised of it, although it had been opened under the old law and considered as a vacant one; that no right had been acquired by any one to its property, by prescription or otherwise, which was, or could be affected, or impaired by the new law; that this is not giving any retroactive effect to the Code of 1825, by which the previous vested rights of the parties were not changed, or even modified, but only applying its provisions to the actual situation of the plaintiffs at the time of its promulgation; and that we see no reason why our previous opinion should be disturbed on the subject of prescription pleaded by the defendants.

But the counsel has suggested, that his clients ought to have the opportunity of showing on a new trial in the lower court, that the price received by Calvit for the property in dispute, was applied to the payment of the debts due by the community existing between himself and his wife, the ancestor of the plaintiffs, in whose right they claim. This, we think, is right, and must be allowed; as though the plaintiffs are entitled to recover their undivided portions of their land, illegally alienated by their natural tutor, they should not be permitted to enrich themselves at the expense of the defendants, who are clearly entitled to the reimbursement of the sums paid for the benefit of the community, to the proportion of the rights of the two plaintiffs, who have succeeded in this action, in and to the property formerly belonging to

the said community; and this cause must also be remanded for the purpose. See *Daquin et al.* v. *Coiron et al.*, 8 Mart. N. S. 608.

It is, therefore, ordered and decreed, that our former judgment be maintained, so far as it goes; and that, in addition to the purposes for which this cause was ordered to be remanded, it be also remanded for the purpose of ascertaining whether the price received by the plaintiffs' father and tutor for the property in dispute, was applied to the payment of the community debts, to which James A. and Coleman W. Calvit are bound to contribute in proportion to their rights thereto; and that, in the mean time, no writ of possession issue, until they have paid the amount which may be found to be due by them on the trial of this cause in the lower court, under our first and our present decree.

DANIEL W. COXE *v.* CHARLES N. ROWLEY and another.

A loan made in bank stock estimated above its specie value, and in depreciated bank notes at par, payable by the borrower in specie, where the sum stipulated to be paid by the borrower exceeds the actual specie value of the stock and notes, with the highest rate of conventional interest, is usurious. Proof that the borrower could pass off the stock and notes at the value fixed by the contract, in payment of debts due by him, does not render the transaction the less usurious.

Where, in sales of stock or depreciated currency, there is ground to suspect a disguised usurious loan, the mere form of the contract will be disregarded. The court will look to its essence, and endeavor to ascertain the true intent of the parties. Where usurious interest has been paid, it cannot be reclaimed.

By the laws of Mississippi (stat. 25 June, 1822,) where an usurious rate of interest has been stipulated, the lender can recover only the principal.

APPEAL from the District Court of Concordia, *Curry*, J.

Stacy and *Sparrow*, for the plaintiff, contended that the contract of Coxe was not usurious. Citing 9 Peters, 399–403. 1 Metcalf, 158. 3 Peters, 42. 4 Howard's Miss. Rep. 622–4.

Frost and *Prentiss*, for the appellants. The contract was usurious. Where a loan is made, under the disguise of a sale of stock, and the stock is taken at a higher rate than its cash value, he contract is usurious. 1 Espinasse, 11, 40. Douglass, 731

1 Ambler, 371. 1 Bro. 149. 2 Ib. 175. 1 Eden, 273. 3 B. & C. 257. 5 D. & L. 138. 7 Mart. N. S. 408. 4 Hill, 255. 7 Leigh, 26. 2 Desaussure, 334. 2 Camp. 375, 555. So where the loan is made in depreciated bank notes, at *par*. 3 Dana, 369. 6 Ib. 286. 2 Ib. 225. 7 Munroe, 336, 354. 6 Munroe, 375. 3 J. J. Marshall, 85. 4 Ib. 48. 1 Ib. 494. 2 Ib. 140. 7 Ib. 105. 1 Yerger, 243. 4 Ib. 444. 7 Ib. 545. 1 Meigs, 591. 7 Paige, 557, 615. 2 Edwards, 273. 2 Harris & Gill, 13. Har. & John. 59. 2 Halsted, 130. 8 Leigh, 238. 1 Bay, 303. 1 Peters, 37. 2 Ib. 536. 9 Peters, 378. 3 Smedes & Marshall, 285. That the contract would be usurious under the English and American statutes, see 2 Peters, 535. 4 Ib. 224. 3 Salk. 390. 17 Vesey, 44. 3 Bos. & Pul. 151. 9 Mass. 53, 55. 15 Johns. 152. 2 Cowen, 678. 4 Randolph, 406. 5 Ib. 145, 162, 352, 560. 4 Munroe, 66. Cro. Jac. 508.

Bullard, J. This is an action to recover an alleged balance of $46,739 49, with interest, upon four promissory notes executed by Charles N. Rowley and wife, and secured by special mortgage on the Marengo plantation and slaves. It is brought against Rowley the maker, and Lansing, who, at a period subsequent to the date of the notes, became the purchaser at sheriff's sale of the mortgaged property, and assumed, as a part of the price, to pay off this mortgage.

The defence is usury. The defendants aver in their answer, that the four notes sued on, and two others which have been paid, were executed for a loan made by Coxe to Rowley; that said loan consisted in one hundred shares of the Agricultural Bank, at $112 per share, amounting to $11,200, but which they allege was worth only $50 per share; that $30,000, the balance of the loan, was received in depreciated notes of the banks of Mississippi at par, not redeemable in specie, nor drawing interest. They allege that the contract was made in the state of Mississippi, although the notes were executed in Vidalia, Louisiana; that by the law of Mississippi only eight per cent interest is allowed, that interest was charged on the loan before the stock was transferred, or the bills paid over, and that ten per cent interest is charged upon the loan up to the maturity of the notes, and included in them; that, for the above reasons, said loan was

illegal and usurious; that, at that time, the defendant Rowley, was harrassed with heavy debts, due and pressing, and that the plaintiff took advantage of his necessitous circumstances to extort from him said ruinous and usurious contract. He admits that he paid the amounts stated in the petition, and prays that the loan be purged of the usury, reduced to its specie value, all the interest rejected, and the payments made, credited on the principal, the cash value of the loan.

The plaintiff, in answer to interrogatories on facts and articles propounded by the defendant, admits, that the consideration of the six notes was a loan of $41,200 contracted by the defendants, by Rowley's order, to Samuel Davis in Philadelphia, and completed by A. P. Merrill, of Natchez, Mississippi; that the funds composing the loan were forwarded by the plaintiff to Merrill and Stephen Duncan, with whom the defendant held communication on the subject; that the loan was composed of one hundred shares of the stock of the Agricultural Bank, at $11,200, and $30,000 of the bills of Mississippi banks; he knows not what banks; that he followed the directions of Mr. Davis in selecting those which were receivable in the payment of debts in that country; that ten per cent interest was included in the six notes, for the amount of the bank bills loaned, from the 1st of September, 1838. Plaintiff alleges, that he does not know to whom, or when, the bank bills were delivered; he admits that the interest on the conventional value of the bank stock was included from the 1st of October, 1838, but does not know when the stock was transferred; he admits that the two smallest notes included in the mortgage, and which have both been paid, are made up entirely of the interest on the loan of the 1st of February, 1840; that the four notes sued on are made up of the principal of the loan, and the interest after the 1st of February, 1840. He avers, that the reason why the interest was calculated from the 1st of September, 1838, was, that the plaintiff's funds were kept locked up for several weeks by Rowley's correspondence with his agent to increase the loan beyond the amount first agreed on, and because time was lost by the manner of transmitting the funds.

The plaintiff goes into other minute particulars which it is not necessary to repeat, inasmuch as it is distinctly admitted, that

the loan was made in bank stock at twelve per cent above par, and bank currency of Mississippi at par. The evidence is, that the bank stock was only worth par in specie, and that the bank notes, on the 8th of October, the date of the loan, were at a discount of nine or ten per cent for specie; and the question is, is such contract usurious?

The question has been much discussed at bar, whether this is to be regarded as a Mississippi or a Louisiana contract, and whether its character is to be ascertained with reference to the law of the one, or of the other state. The decision of the court in the case of *Depau* v. *Humphrey* (8 Mart. N. S. 1,) in which we held, that the law of the place where the contract was entered into, must govern in relation to stipulated interest, has been much combated. The first proposition for this loan was made in Pennsylvania; the final assent was given, and the money paid over, in Natchez, and the notes given in Louisiana, but made payable in Mississippi. We have not thought it essential to decide upon this point, inasmuch as there is no important difference in the two systems; both allow ten per cent interest if stipulated, and in both, the stipulation for a higher rate of interest is regarded as usurious, and followed by forfeiture of all the interest.

A loan of depreciated bank notes, payable by the borrower in money, at a rate which, added to the depreciation, will exceed the highest rate of conventional interest, is undoubtedly usurious. We do not mean to say that, in all cases, a loan of depreciated currency is always and essentially usurious. Cases may be supposed in which it would be perfectly legal. The case of the *United States Bank* v. *Waggener and others*, (9 Peters, 378,) illustrates this position. The subject matter of the loan in that case, was depreciated paper of the Bank of Kentucky, which had been taken up by the United States Bank at par, and retained by them, and which, by an agreement with the Bank of Kentucky, bore an interest of six per cent. When the bank of the United States lent $5000 of that fund to Owens, and took his note for the same amount, with the same rate of interest from the date of the loan, there was obviously only an exchange of credits; the Bank had parted with their claim, which they had received as cash and which bore interest, and received in place

of it Owens' note, bearing the same rate of interest. Here was no shift or device by which a higher rate of interest than the law allows, was secured to the Bank. But the case now before the court is quite different. The depreciated funds borrowed by Rowley as cash, and which he engaged to pay in cash, with interest at ten per cent, were not of specie value to Coxe. If he had sold them for specie, they would have brought him four or five thousand dollars less than the nominal amount of the loan. But it is said, Rowley was enabled to pay them off at par, and, therefore, they were worth cash to the borrower. There is a palpable fallacy in this argument; for it is clear, that, if with $41,000 he could pay that amount of debts, he might, with the same amount of specie, have bought the same kind of currency to a sufficient amount to have paid $45,000 of debts. Coxe, therefore, forfeited to the amount of that difference over and above the ten per cent interest stipulated.

It has been strenuously urged, that the intent to make an usurious contract must be clearly shown. This is undoubtedly true; but where, on the face of the contract, it appears evident that a loan of depreciated paper was contemplated, the intention is manifest; *res ipsa loquitur*. In cases of the sale of stocks or depreciated currency, where there is ground to suspect a disguised usurious loan, courts will disregard the mere form of the contract, and, looking rather to its essence, endeavor to ascertain the true intent of the parties. In this case, there can be no pretence that it was not intended as a loan of depreciated currency as if it had been specie; the parties have not even chosen to give it another name; it is spoken of as a loan throughout, and interest is charged on $30,000 from the 1st of September, although the funds were not paid over to the borrower until the 8th of October, under the pretence that they were lying idle waiting the issue of the negotiation.

These principles appear to be well settled at the present day, as may be seen by reference to numerous adjudicated cases in different states of the Union, as cited to us in the argument, and referred to in the brief of the appellant's counsel, to which we refer.

According to the evidence in the record, the value of the bank stock transferred as part of the loan, was $10,000; and the $30,000 in bank notes at a depreciation of ten per cent, were worth $27,000; making the total of the loan, reduced to a specie standard, $37,000.

Upon one of the notes, which was made up partly of the usurious interest, there was paid $7951 52, which must be imputed equally to the capital and stipulated interest, because usurious interest being once paid cannot be reclaimed. The note upon which the payment was made, was composed of the capital, and about twenty per cent interest included. Deducting, therefore, twenty per cent from the amount paid, will leave a balance of $6361, paid upon the real capital, and the balance due to the plaintiff is $30,639. It only remains to inquire whether the plaintiff is entitled to recover interest, *ex mora*, upon the amount justly due. By the laws of Mississippi, where the notes were made payable, the rate of that species of interest is shown to be eight per cent, from the time the debt is due and payable. Howard & Hutchinson's Dig. 375, sec. 16.

Our first impression was, that this rate of legal interest might be recovered upon the amount found due, after expunging all conventional interest, and indirect advantage secured by the lender over and above ten per cent; but upon looking again into the statutes of Mississippi, we find a positive provision, that nothing else shall be recovered but the capital alone—"the principal sum only shall be recovered."*

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and it is ordered and decreed, that the plaintiff recover of the defendants, *in solido*, the sum of $30,639, with costs in the District Court; and that the mortgaged premises be seized and sold to satisfy the same: the costs of the appeal to be borne by the plaintiff and appellee.

* Statute of 25 June, 1822.

The Citizens Bank of Louisiana *v.* Stephen E. Cuny and others.

The vendor of a tract of land received from the purchaser his note for the price, endorsed by a third person. A mortgage was reserved by the notarial act of sale to secure the payment of the note, which was duly *paraphed* by the notary. The act was recorded in the mortgage office, and on the same day the vendor wrote on the face of the record, that "the mortgage is hereby released, without, however, acknowledging payment of the price of the purchase money." The release was gratuitous, and no third person had acquired any rights under it. In an action by plaintiffs, who had discounted the note, which was protested for non-payment, against the endorsers and the maker, claiming the vendor's privilege: *Held*, that there is a difference between a special mortgage reserved to secure the price of the thing sold and the vendor's privilege: that the release of the mortgage did not extinguish the privilege, which resulted from the terms of the act; and that the parties cannot avail themselves of the release of the mortgage, to the prejudice of plaintiffs, who took the note on the faith of their signatures and endorsements, and with reference to an act which showed a sale on credit, and an express acknowledgment, accompanying the release, that the price had not been paid.

Appeal from the District Court of Rapides, *King*, J.

Dunbar, *Hyams*, and *Elgee*, for the appellants. The release of the mortgage did not extinguish the vendor's privilege. The latter arises from the very nature of the debt. 17 Dalloz, 116, 121, 122. Persil, Ques. Hyp. p. 64. Until the price is paid, the vendor's title is defeasible, and the sale may be rescinded. Civ. Code, arts. 3516, 2527, 2539, 2041. *Martee* v. *Roach*, 8 La. 82. A special mortgage arises from convention. The privilege and special mortgage may exist together. *Accinelli* v. *Menard*, 2 Mart. N. S. 222. The privilege is of a higher nature than a mortgage, and the renunciation of the former cannot be presumed from a relinquishment of the latter. Persil. Quest. Hyp. p. 38. In *Howard* v. *Thomas*, (3 La. 112,) it was decided, that the vendor's privilege would continue till the price was fully paid, though the mortgage was to be released. See also Persil, Régime Hyp. pp. 64, 65, Nos. 6, 7. 3 Robinson, 216. The express declaration of the vendor, at the time of re-

leasing the mortgage, that he does not thereby acknowledge the payment of the price, is a reservation of his privilege as vendor.

Brewer, for the defendants.

BULLARD, J. On the 15th of November, 1836, Littleton Bailey, by an act passed before Binghurst, notary public, sold to Stephen E. Cuny a tract of land in the parish of Rapides, for $6350, payable in three equal instalments, for which Cuny executed his three promissory notes, endorsed by Philip M. Cuny, payable in the office of the Bank of Louisiana, at Alexandria. At the close of the act which sets forth these particulars, it is added, that to secure their payment, the property sold is mortgaged and hypothecated in favor of said Littleton Bailey, and the notes are paraphed by the notary to identify them with the act.

It appears that, on the same day, a copy of this act of sale was recorded in the office of the Recorder of Mortgages, of the parish of Rapides, and at the same time Bailey, the vendor caused to be written on the face of the record, the following declaration: "The mortgage herein contained is hereby fully released and discharged, without, however, acknowledging the payment of the price of the purchase money." Signed by L. Bailey, and attested by the Recorder of Mortgages.

Two of these notes were afterwards discounted by the Citizens Bank, and having been protested for non-payment at maturity, the present action was brought against the drawer and endorser.* Judgment was rendered in favor of the plaintiffs, for the amount of the notes subject to a credit; but the court refusing to order the land to be sold to pay the same, being of opinion, that the release of the mortgage by the vendor, carried with it the extinguishment of the vendor's privilege, the Bank appealed.

We have had this case a considerable time under advisement upon a re-hearing, and are now satisfied that the court below erred. The notes discounted by the plaintiffs, bore the paraph of the notary, and by reference to the act, the plaintiffs were informed of the nature of the debt of which they were the evidence, to wit, the price of the tract of land unpaid; they may not have

* And against Bailey.

taken the notes on the faith of the special mortgage reserved; but the effect of Bailey's release of the mortgage could be no greater, than if the clause in which the mortgage is reserved, had been expunged from, or never inserted in the deed. There will still remain enough to show that the vendor's privilege resulted from the terms of the act. The release by Bailey appears to be wholly gratuitous, and no third person has acquired any right under it, so far as the record shows. All the parties to the original transaction, and they alone, are before us, except the plaintiffs, who advanced their money upon the faith of that contract. There is, undoubtedly a difference between a special mortgage reserved to secure the payment of the price of the thing sold, and the vendor's privilege. The vendor's privilege gives to the vendor in addition to the right to have the property sold to pay the price, a rank in relation to other creditors of the vendee, which he might not otherwise have. It confers upon the vendor a right to the rescission of the sale on the non-payment of the price; and Bailey, by transferring the notes, parted with these accessory rights, which vested in the plaintiffs as the holders of them. Under these circumstances, we are of opinion, that none of the parties have a right to gainsay the existence of the vendor's privilege, as it results from the tenor of the deed passed before Bringhurst, independently of the special mortgage therein reserved; and that the parties cannot avail themselves of the release of that mortgage to the prejudice of the plaintiffs, who took the notes on the faith of their signatures and endorsements, and with reference to an act which showed a sale of land on credit, and an express acknowledgment, accompanying the release of the mortgage, that the price had not been paid.

It is, therefore, adjudged and decreed, that the judgment of the District Court, so far as it refused to order the land to be seized and sold, be reversed; and it is ordered and decreed, that the land be so seized and sold to satisfy the judgment therein rendered, and that the judgment of the District Court be affirmed in all other respects, with costs in both courts.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

IN THE

EASTERN DISTRICT, AT NEW ORLEANS, COMMENCING, NOVEMBER, 1844.

PRESENT:

HON. FRANÇOIS XAVIER MARTIN.
HON. HENRY ADAMS BULLARD.
HON. ALONZO MORPHY.
HON. EDWARD SIMON.

BERNARD MARIGNY *v.* THE UNION BANK OF LOUISIANA.

Money placed in the hands of a cashier of a bank to be transmitted to a branch, having been lost through his negligence, to protect himself from suspicion he gave his notes for the amount, endorsed by a third person, the surety on the bond given by the cashier for the faithful discharge of his official duties. The notes having been paid by the endorser, in an action by the latter to recover the amount paid on the ground of error and illegality or want of consideration: *Held*, That the consideration for which the notes were given was not illegal; and that the obligation of the cashier to make good any loss occasioned by his neglect, if not a legal obligation, was, at least, a natural one, and sufficient to prevent the endorser from recovering back the amount paid by him. C. C. 2281, 2285.

A promise to pay pre-supposes a consideration. It is for the party seeking to avoid the promise to show that there was none.

The burden of proof is on the party affirming.

Fraud will not be presumed; like other allegations it must be proved; but it may be proved by circumstantial as well as by direct evidence; by simple as well as by legal presumptions. C. C. 1842.

The verdict of a jury must be set aside when evidently wrong.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Roselius and *Soulé*, for the plaintiff, cited Civil Code, arts. 1887, 1889, 1890, 2280, 2282, 2284. Digest, vol. 1., p. 266–267; vol. 2., p. 251–2. 10 Duranton, p. 341, Nos. 321–5. 2 Demante, 262. Chardon, vol. 1., pp. 172–6; vol. 2, pp. 1, 2; vol. 3, pp. 365–6. Pothier, Oblig. Nos. 42–3. Merlin, Repert. vol. 12, p. 448; vol. 14, *Verbo* Indice, pp. 265–7, ed. Brus. Angell & Ames on Corp. 60. 10 Wheaton, 67, 69, 71. 1 Ayliff, pp. 199, 200.

Denis and *Grymes*, for the appellants.

GARLAND, J. This case was before us in July, 1843, and remanded for a new trial. 5 Robinson, 354. The pleadings were then stated in full, and it is not necessary to repeat them in detail. The allegations are briefly these:

1st. That M. Gordon, Jun., being the cashier of the Bank, acknowledged that he was indebted to it in the sum of $51,500, for which he gave his four notes, in equal sums, endorsed by M. Gordon, Sen., and the plaintiff, payable at different periods.

2d. That the petitioner, being in no way connected with the business and private transactions of said M. Gordon, Jun., was induced to endorse the notes by the consideration professed by the Bank, that the indebtedness of said Gordon was honest and real, and that the notes would be fully guarantied by substituting in their place other notes, which were to proceed from the sale of the property of the drawer, to be sold in a short time.

3d. That he was further induced to endorse said notes, by the unequivocal and repeated assurances on the part of the Bank, that the said M. Gordon, Jun., would thereby be enabled to keep his office of cashier, which he then held, at a salary of $8000 *per annum*; which was to be applied to the payment of said notes, should it happen that the property to be sold should prove insufficient to cover them.

4th. That if it had not been for these considerations he would never have endorsed the notes.

5th. He further states that, at the time he endorsed the notes, it was within the knowledge of the directors of the Bank, that M. Gordon, Jun, could not effect the sales of property contemplated for any thing like the amount of the notes, and that they

knew full well the inability of the drawer to pay them, and his absolute insolvency.

6th. That although the directors exerted themselves to represent the indebtedness of M. Gordon, Jun., as originating in a moral and legal cause, yet they did so for the sole purpose of entrapping the good faith of the petitioner, while they prepared themselves to dismiss said Gordon as cashier, as soon as the security should be obtained.

7th. That by the wicked practices and frauds of said Bank, and their connivance with said M. Gordon, Jun., to screen him from what he considered a dangerous debt, and by the suggestions of the directors tending to impress the petitioner with the idea and belief that his said endorsements would be nominal, which were assumed to be covered by the proceeds of the sales which they knew could not be effected, and by the proffered assurances that Gordon should keep his office, and thereby be enabled to protect the endorsements given, they induced him to sign the same, and brought on him the necessity of paying them; whereby he has sustained damage as claimed.

The defence is fully stated in the former report of the case.

In consequence of the evidence introduced on the second trial, it becomes necessary to restate, at length, the evidence laid before the jury.

The board of directors chosen by the stockholders of the Bank, and appointed by the Governor and Senate, in the month of January, 1839, entered upon the performance of their duties on the second Monday of February, and elected C. Adams, Jun., president of the Bank, in place of Mr. Milligan. They found Martin Gordon, Jun., in office as cashier, under a bond for $50,000, signed by the plaintiff and three other persons as his sureties; the condition of which bond is, that said cashier "shall render a faithful account of all moneys and effects committed to his charge, and well and truly perform the duties of said office, and all other official duties committed to his charge in said Bank." They also found an application from the plaintiff, dated the 4th of February, 1839, for a loan of $35,000, to be secured by a mortgage on certain real estate. In this application, the plaintiff states that, without exaggeration, he owns property worth a million of

dollars, and that his *floating debt* in the banks, and elsewhere, does not amount to more than $85,000, notwithstanding which, he says, he is excessively harrassed or cramped for money, (*excessivement gené,*) and that as he could not procure in the other banks the sum he needs, he has thought, as he had been a patron of the institution in the legislature, and had friends who knew his affairs at the board, he would submit a proposition for a loan. He stated that Preval, one of the directors, knew his affairs as well as he did himself.

It was the duty of the new president to examine the situation and affairs of the Bank; and, upon looking into the monthly accounts current from the branches, he found in the accounts from the branches at Natchitoches and St. Martinsville, that the mother bank was not credited with certain sums with which they were charged on her books. He inquired of the book-keeper how that happened, who replied, that he had noticed the difference, and said he had informed Gordon, that there was no acknowledgment of the receipt of those sums by the branches. Adams then spoke to Gordon, who seemed astonished that those letters had not been received. The president then considered it his duty to bring the matter before the board of directors. See Frey's testimony, plaintiff's letter, and Gordon's bond. Preval said, that the board of directors appointed a committee to inquire into the causes of the *deficit*, of which committee he was a member, Adams and Milligan being the other members. At what precise date the president made his communication to the directors, is not shown by any witness or document. It must, therefore, be inferred from circumstances. Preval says, that "the causes of the *deficit* could not be discovered; but that the committee thought there was, at least, great negligence on the part of Gordon, the cashier, which negligence consisted principally in this, that a considerable time had elapsed between the time at which he said he had sent the money to the cashiers of the branches, and the time at which he informed the board that he had received no news of the reception of the funds. The committee was of opinion that the negligence was such, that the said Gordon was obliged to refund the sum which was then wanting, and notified their intention to Gordon, the cashier, who subscribed to it, and

in consequence thereof, made propositions to settle the said *deficit*. The propositions were, to furnish a mortgage on certain property, of which he gave a memorandum to the committee, who refused to accept the same, on account of the pre-existing mortgages against him, and the tacit mortgage of his wife, who was then a minor; the said property not being by them considered as sufficient security. It was then that Gordon offered to furnish his notes, endorsed by his father and Bernard Marigny, with the condition that Gordon, the cashier, after furnishing such notes, would sell his property at such terms as to meet, by fifteen days before maturity, his notes to the Bank, by those given in payment of the property sold, in substitution of those by him furnished, endorsed by his father and B. Marigny; with the condition however, that the notes given in substitution, should also be endorsed by Marigny." The committee made their report on this basis, and it was adopted by the board. Another reason why the committee refused to receive the offer of the mortgage security from Gordon, Jun., was, that he was largely indebted to the Bank, in a sum of twenty-five or thirty thousand dollars, as appears in another place.

From the testimony of Hiriart, given on both trials, (and here it may not be amiss to remark, that all the evidence taken on the first trial was read in the second,) it appears that, about the last of February, or the first of March, 1839, he was informed by the plaintiff of the loss of a certain sum of money, said to have been sent by Gordon, the cashier, through the post office. The witness says, he had some doubts whether it had been lost in that way; and when Marigny told him, at the theatre, about the *deficit*, and how the money had been put in the post office, he laughed at it, and told him that he did not believe a word of it. "The first time Marigny spoke to witness about this matter, he told him (witness) that he was requested by Gordon, Sen., to endorse Gordon, Jun.'s, obligations to the Bank, to cover a loss of $50,000, in bank notes, which said Gordon, Jun., had put in the post office. Mr. Marigny was then in the firm belief that the money had been really lost, and witness was not of that opinion, and was still less, when he understood from Chinn that the notes were of five and ten dollars." A few days after this conversa-

tion, early in March, the witness met with T. W. Chinn, one of the directors of the Bank, and having an opportunity to converse with him on the subject, " he asked him if the Bank had the intention of keeping said Gordon as cashier. Mr. Chinn answered, probably not; but that it had been necessary to postpone such a matter for the interest of the Bank. The witness then told Chinn, that no director appointed by the State could entertain a hope of being confirmed by the Senate in a future nomination, if they were to keep Gordon as cashier. Chinn said he would be removed. Witness then asked him if Marigny had not given security, and engaged his property for Gordon. Chinn answered, that thing was to be done, but that he did not know whether it was then done; but that Gordon would soon be removed from office, because the business will be settled." He then asked Chinn if his opinion was, that Gordon had really lost the money by sending it to the cashiers of the branches, adding that, as to himself, he did not believe it; and Chinn said he did not believe it. He then proceeded to say, he took great interest in young Gordon, as his father had been of great service to him on his arrival in the State; and proceeded to relate a conversation he had held with the cashier, on the piazza of the Bank, the purport of which, as gathered from the statement in both trials, is, that Chinn requested Gordon to tell him how it happened that he had gone to the post office to put so large a sum in it without taking a receipt; and further asked him, if he did not know, that so large a sum of money, in five and ten dollar notes, would make a bundle as large as his hat. Young Gordon did not answer. Chinn then asked him, if he had not received within a few days, a sum of about $30,000, from his father-in-law, and what he had done with that sum. Gordon said he had not received it. Chinn replied, I have been told so by Mr. Field, and as he is now passing, I will ask him. He did so, and Field replied: " I have said nothing more than the truth;" whereupon Gordon exclaimed, " Oh, Mr. Field, you injure me; you ruin me and my character." He passed on, and Chinn then said: " Ah, Martin, I think it is still worse than I thought before;" meaning, as he says, Chinn told him, that the *deficit* exceeded $50,000, and that Gordon had put the sum of $30,000, among the cash in the Bank, to cover a larger *deficit*.

That he could not believe the money had been lost, as he stated, and he must have taken it to pay his debts, or those of his father. The witness further says, that one or two days after his conversation with Chinn, he met Adams, the president of the Bank, and asked him, if he intended to keep Gordon, Jun., as cashier; adding, that he was a senator, and would not vote to confirm any state director, who would consent to keep him in office. Adams replied, that he would not be kept long, and would be removed, but it was not time yet to turn him out. On the second trial, the witness said, that when he asked Chinn if the board intended to keep Gordon as cashier, the answer was, that they were about to settle with Gordon, Sen., and Marigny that business, and that they would not turn young Gordon out before the settlement was accomplished.

We come now to a part of the testimony of this witness given on the first trial, which it is somewhat difficult to reconcile with his statements on the second. At page 22 of the record, he says, "that his conversation with Marigny, alluded to in his former testimony, took place about the latter end of February, 1839, or beginning (say 1st or 2d) of March. Spoke to Marigny, of his (witness') conversation with Chinn, in the month of April or latter part of March; he thinks during that conversation, Marigny told him he had endorsed the notes, and witness said that he was wrong, and told him of his conversation with Chinn." At the second trial, Hiriart said: "Mr. Marigny told witness at the theatre about the *deficit*, and how the money had been put in the post office; witness laughed, and told him he did not believe a word of that."

"When witness came down after his conversation with Chinn, witness had also some conversation with Marigny; thinks at that time Marigny had already given his endorsement; witness went on, and told him what he thought of the loss of the money; about fourteen months after that, Marigny took witness by the arm, and asked him what conversation witness had with T. W. Chinn and C. Adams, Jun? Witness then told him what were his impressions, and what was the conversation he had with Chinn and Adams some months previously. It appears at that time, Marigny was about suing the Union Bank, and told witness, that he called

some time before on Frey the cashier, for a copy of the proceedings of the Bank concerning the affair. He is convinced, that when that conversation took place, Marigny had paid the notes that he had endorsed to pay the *deficit* above mentioned. Witness wishes to amend his former declaration, in stating that when he informed Marigny of the conversations he had had with Chinn and Adams, Marigny had already paid the notes that he had endorsed for Gordon. After his conversation with Chinn he saw Marigny, but did not give then the above details; it was only fourteen months after that he did so."

Preval was one of the directors of the Bank, an intimate friend of the plaintiff, and one of the committee to examine into the *deficit*. We have previously stated, what he said the action of the committee was. He is the person who, the plaintiff says in his letter, knew his affairs as well as he did himself. He testifies that the personal and business relations of the plaintiff and M. Gordon, Sen., were of the most intimate kind. The friendship between them, was one of the reasons that induced the plaintiff to endorse the notes of Gordon, Jun. "Marigny told witness, that his situation towards Gordon, Sen., was such that he could not refuse him anything. It is not to witness' knowledge, that the Bank employed any fraudulent means to engage Marigny to endorse the notes." He further says that, on the 18th of March, 1839, the day on which the notes were dated, being about to go to the meeting of the board of directors, he sent a message to the plaintiff, requesting him to come to see him. He came about nine o'clock, A. M. The witness told him, he had sent for him to inform him of a serious occurrence in the Union Bank. That there was a *deficit* or loss, and the information had been given to the board by Gordon the cashier, informing them officially, that he had sent the money through the post office, to two of the branches, and that he had not as yet received any information of its receipt. He told him a committee had been appointed to investigate the affair, and that the result had been, that Gordon had bound himself to reimburse the sum by notes at 12, 15, 18, 24 months, to the order of his father, and endorsed by him, Marigny. He told plaintiff, that he had sent for him to inform him of the facts. The plaintiff replied, "what shall I do in such a

case?' The witness said, he supposed, in consequence of the relations of friendship between him and Gordon, Sen., he would find it difficult to refuse his endorsement. Plaintiff was silent a time, but as the witness was about to leave, he asked if witness thought there was any danger in his endorsing for that amount, and witness replied he supposed not, and went away. The witness went to a meeting of the board, and whilst it was in session, or shortly after its adjournment, the plaintiff came in. He had in his hands the notes of Gordon, Jun., endorsed by Gordon, Sen. He called Milligan aside, and had a conversation of some minutes with him. Milligan showed him the report of the committee, and the plaintiff endorsed the notes on the table in the directors' room, without conversing with any other director. The witness did not conceal from plaintiff anything he knew on the subject, or his opinions of the matter.

This witness on the first trial said: "When the board was trying to come to a settlement of the *deficit* with Martin Gordon, Jun., the said Gordon was made to understand, that if the settlement was made, he would be permitted to keep his office of cashier. After the transaction was completed, the witness heard from some of the directors, principally from Milligan, that they would intimate to Gordon that he must resign." Milligan said he had told him to resign. On the second trial the statement is: "It was understood at the time the arrangement took place, that Gordon should retain his office as cashier." And he "resigned his office, because some of the directors gave him to understand that he ought to resign. Says that among the directors it was suggested that it would be well for him to send in his resignation. From all the circumstances, does not believe that the resignation was a voluntary one."

Bermudez says, he was a director of the Bank, and was present when the endorsement of the plaintiff on Gordon's notes was first spoken of. He does not recollect when information was required about the value of the property. The information he had, as to the *deficit* and proposals made, were from the committee. He observed, at the board, that as Marigny would perhaps have some objections to give his endorsement for such a sum of money, if he knew the facts and circumstances of the *deficit*, he

ought to be informed of them all. Some members of the board of directors were invited to see Gordon, Jun., and invite him to resign. His resignation may be termed a voluntary one—he would call it so; but if he had not resigned, he would have been removed. The witness spoke of the affair to plaintiff after the notes were given, and he questioned witness as to some facts. He did not disclose all his opinions and views in regard to the *deficit*. He had another conversation with plaintiff after public opinion had been expressed on the subject of the *deficit*, and he reproached witness on the subject, saying he should have been informed of all the circumstances; when witness replied, it was not his duty to inform him of all that, and he thought Preval had done so; and he had done at the board, all he could to have him informed of the *deficit*, before the endorsement of the notes.

Frey was a director of the Bank, at the time the *deficit* was discovered, and the notes given by Gordon and endorsed by plaintiff. "There was no manœuvre on the part of the Bank, to obtain the endorsement. It was Gordon, Jun., who offered the endorsement of plaintiff, who knew, as well as witness did, what were the circumstances, because, before signing, Marigny inquired of witness about it, and he told him all he knew. Witness knows further, that another director of the Bank, advised Marigny not to endorse the notes. It was James Freret. During that conversation between witness and Marigny, this last one told him, that he had nothing to refuse to M. Gordon, Sen." He cannot state the precise time of this conversation, but it was certainly before the settlement with M. Gordon, Jun., was completed. "It was publicly known that the *deficit* existed, and that it was said by Gordon, that the bundle of notes had been lost through the post office. It is not to witness' knowledge, that there was any express or tacit agreement between Gordon and the board, that he could retain his office after the settlement proposed. Marigny asked witness if Gordon was to remain as cashier, and witness answered, that he saw nothing to the contrary. He was astonished when Gordon first told him that he was to resign, for witness had never spoken of it with any director of the Bank."

On the 18th March, 1839, the plaintiff endorsed the notes, and on that day, a resolution was entered on the minute book of the

board of directors, appointing a committee to confer with the cashier on the subject of the remittance to the branches, and to report on the causes which may have occasioned a *deficit* of $51,500. The report of that committee, is entered on the minutes the 19th of March; but it is evident, that the committee existed before the date when it appears to have been appointed, and that the report made to the board of directors was prepared before the date at which it purports to have been presented.

The report states, that on the 5th of March the cashier said to the directors that, on the 15th November previous, he had sent $15,000 to the branch at St. Martinsville, and on the 17th of December, he had sent $8,000 to the same branch, and $38,500 to the branch at Natchitoches, of the receipt of which sums, he had received no information, except a letter from the cashier at St. Martinsville, acknowledging the receipt of a package of $10,000 on the 7th of January, 1839. The committee say, that the cashier perseveres in his statement of having remitted the sums stated, about the dates mentioned, through the post office; and accounts for the sum of $10,000 being received at St. Martinsville instead of $8000, by supposing he may have put $2000 less in one of the other packages. He said he had put the packages in the post office in person; that he had no particular instructions as to the manner of sending money to the branches, except verbally, which were to send the notes by some trustworthy persons, or by the post office when the river communication was obstructed. That no news had been received of any accident or obstruction having occurred, in the transportation of the mail to the places mentioned. These circumstances, the report says, the cashier thought would have the effect of injuring his character, and casting some doubts upon his integrity, wherefore he had offered to pay the amount of the loss, by giving his notes, endorsed by his father and plaintiff, payable in equal instalments, at 12, 15, 18 and 24 months, binding himself to dispose of sufficient property to meet the sum stated, upon such terms as to meet, fifteen days previous to maturity, the notes to be given. The notes received from the sale of the property to be endorsed by M. Gordon, Sen., and plaintiff, and to be substitued in place of the others. The committee say, they will not express any positive opinion upon the causes of the loss

of the money; but recommend the adoption of the proposition offered by the cashier, and that authority be given to the president, to pass the necessary acts to guaranty the fulfilment of the proposal.

On the 21st March, M. Gordon, Jun., addressed a letter to the board of directors, stating that he had been informed it was their intention to remove him from office, on account of the loss of $51,500, which he had forwarded to the different branches, and desiring to know if such was the intention of the direction. In reply to this, a resolution was passed, directing the president to inform him "that no decision of that kind had been made, nor any motion to that effect been presented to the board."

On the 9th of April, a letter from Gordon, Jun. was laid before the board, in which he stated that he resigned his office, to take effect on the 1st of May following, whereupon, the following preamble and resolution were adopted. "Whereas an incident has occurred in the Union Bank of Louisiana, in the transmission of $51,500, from this bank to two of its branches, by the cashier of this bank, and which sum has been lost or not come to hand, and, whereas the said transaction might be construed to the prejudice of the integrity of said cashier,

"Be it, therefore, resolved unanimously, that the confidence of this board is unimpared in the honor and integrity of Martin Gordon, Jun., cashier aforesaid, and that they fully acquit him of all suspicion arising out of this transaction, calculated to attach suspicion to his integrity."

Bermudez says he was present at the board when the resolution was passed. There being no satisfactory proof that Gordon had stolen the money, they were bound to presume he was innocent. The resolution was called for by M. Gordon, who said his character would be injured by his leaving the bank, and that many would say he had taken the money, if such a resolution was not passed. Preval said, as a member of the committee, he was of opinion that Gordon had been very negligent, but he was not able to come to the conclusion that he had embezzled the funds of the Bank, and subjected himself to a criminal proceeding. Frey says, that Gordon was very negligent in forwarding the money in that way, but he had no reason to disbelieve his state-

ment. His opinion was, and the opinion of the board, as far as he knew it, was, that the thing had taken place, as Gordon stated it. He thought it extraordinary, but nothing could make him believe that Gordon had stolen the money; he had too much esteem for him to form such an opinion, without proof. What motives the other directors had in voting for the resolution, are not stated.

In the course of the month of April, 1839, plaintiff, in his application to the bank for a loan, obtained one for $20,000 on mortgage security.

On the 1st of May, Gordon left the Bank; and, a few days after, plaintiff left for France, from whence he did not return until the month of December following. Gordon, on the 13th of May, had the preamble and resolution published in a newspaper. On the 28th of June, he went before a notary, and, recognizing the promise he had made to furnish an indemnity to secure the payment of the notes, and especially "to protect the said Bernard Marigny, and save him harmless from the effect of his endorsement on said notes," he gave a mortgage on a great deal of property, but upon which there were some previous liens.

About the 21st March, 1840, one of the four notes fell due, and, not being paid, was protested. On the 12th of March, 1840, before any of the notes were due, the plaintiff addressed a letter to the Bank, saying that he was very desirous of extricating himself from the difficulties thrown upon him by his endorsement of the notes of Gordon, Jun., and, not doubting the liberality of the board, he hoped it would be extended to him in his then situation; he, therefore, offered to pay the four notes of Gordon, and his own note of $20,000, in the bonds of the New Orleans Theatre Company. He says, if the amount of the bonds of which he can dispose, leaves a surplus over the endorsements and his note, he has no objection to its being applied towards his endorsement of a note of Martin Gordon, Sen., for about $9000. This proposal was finally accepted, the Bank agreeing to take the bonds at a discount of twenty per cent. The arrangement was completed on the 29th April, 1840, when the plaintiff took up all the notes of Martin Gordon, Jun., also the note of Martin Gordon, Sen., and instead of paying his own debt of $20,000, he paid one

year's interest, and it stood over. The Bank gave him the notes; and by a notarial act of the same day, transferred to him the mortgage given it by M. Gordon, Jun., with a full subrogation of all rights and privileges against him. With these notes, the plaintiff, on the same day, went to the Citizens Bank, and by pledging them, as security, he got his note or notes endorsed by John Davis, discounted, to the amount of $26,000.

M. Gordon, Jun., made a cession of his property on the — day of ———; the plaintiff attended a meeting of his creditors, as one of them, with the notes he had taken up, and actually received from the syndic upwards of $11,000 on the mortgage.

At the time of all these transactions, it was known to the plaintiff, and publicly known, that M. Gordon, Jun., had left the Bank since the 1st of May previously, and was no longer its cashier.

Upon this testimony, the jury a second time found a verdict for the plaintiff, for upwards of $53,000, and the defendants have appealed.

We are of opinion that the evidence establishes:

1. That there was a *deficit* in the cash belonging to the Bank, and that the committee was of opinion it was caused by the negligence of Gordon, the cashier. It was so gross as to induce the committee to notify him of it, and of the opinion that he was liable to refund the money; to which he assented, for that and other reasons as stated in the report shown to plaintiff, and in Preval's testimony.

2. That the plaintiff was one of four joint and several sureties on the cashier's bond, and if M. Gordon, Jun., was liable on it, plaintiff was also liable for $50,000, subject to his recourse on his co-sureties.

3. That at the time of the discovery of this *deficit*, the plaintiff was much cramped in his pecuniary affairs, and harrassed for money, and was solicitous to obtain a loan of $35,000, representing himself as a very rich man; and he knew that loan could not be obtained, if a suit was commenced on the cashier's bond.

4. That the personal and business relations of plaintiff and M. Gordon, Sen., were very intimate, and, to use the expression of the former, he could not refuse the latter anything. Preval says, the friendship of plaintiff to Gordon, Sen., was one of the

reasons that induced him to endorse the notes of Gordon, Jun. Plaintiff was the endorser of Gordon, Sen., to the amount of $40,000, and the latter his endorser to the amount of $48,000. Gordon, Jun., owed the Union Bank upwards of $25,000, for which Gordon, Sen., was his endorser.

5. That the plaintiff in the latter part of February, or the early part of March, 1839, was informed of there being a deficiency in the funds of the Bank, and had, previously to his first conversation with Hiriart, been applied to by Martin Gordon, Sen., to endorse the notes of Gordon, Jun., to be given the Bank to cover a loss of about $50,000. He told Hiriart of it at the theatre, and, although he may have believed Gordon, Jun., was not culpable, and the money was lost from the post office, yet he knew Hiriart did not believe it.

6. That the committee of examination was appointed at an earlier day than the 18th of March, when the resolution ordering it was entered on the minute book or journal; and that the committee had performed their task, and that they put their report in writing, that day, or a short time previously.

7. That the proposition of Gordon, Jun., to give his notes endorsed by Gordon, Sen., and plaintiff, was made and accepted several days before the notes were executed; and that there was an understanding, that young Gordon was to sell his property on such terms as to anticipate, by fifteen days, the maturity of his own notes, which were to be given up as soon as others were substituted in their place. But we see no evidence that the Bank guarantied to the plaintiff the performance of this stipulation.

8. That the testimony of Preval and Frey proves, that they communicated to the plaintiff all the circumstances relative to the *deficit*, which they, as directors, knew; and that the former told him of the proposition of Gordon, Jun., to give notes endorsed by him; and that Freret also warned him not to endorse the notes. No other directors of the Bank conversed with the plaintiff previous to his endorsing the notes, than Preval, Frey, Freret, and Milligan. The latter is dead, and Freret was not called as a witness by either party. The conversations with Bermudez were subsequent. The plaintiff asked Frey, if Gordon, Jun., was to be retained, and he replied that he knew of nothing to the contrary;

and it is probable that Preval told him that it was understood he would be retained, although he does not say so in terms. He says, he gave him all the information he possessed, or words to that effect, and we think such was his impression when he endorsed the notes, although no positive agreement to that effect is proved, as between the plaintiff and defendants; nor was it an absolute condition in the contract.

9. That the testimony of Hiriart satisfies us, that early in March, 1839, he had a conversation with T. W. Chinn, one of the directors, and that he told him it was very probable Gordon, Jun., would be removed from office; but that it was not then the time to do it, and that an arrangement was pending which made it necessary to retain him. We believe, also, that Hiriart spoke with Adams on the subject, and that the latter used such observations as induced the witness to believe, that Gordon was to be removed, and that he was only retained until the interest of the Bank was secured. It is probable, that Chinn and Adams used the language the witness attributes to them; and we further believe, that he informed the plaintiff of both conversations in the latter part of March, or early in April, 1839. In his testimony on the first trial, he says so, positively; on the second trial, he says, he did have a conversation with plaintiff on the subject, about the time mentioned, but he did not give all the details until about fourteen months after his first conversation. We believe, that this witness held at least three conversations with the plaintiff, to wit, one about the last of February, or the 1st of March, 1839, which induced him to speak to Chinn and Adams; another about the last of March, or first of April in the same year; and a third about the month of May, 1840. Our belief, that in the second conversation, the witness told plaintiff of his conversations with Chinn and Adams, is confirmed by the manner he says the third conversation commenced. He says, that Marigny took him by the arm and asked him, what conversation he had had with T. W. Chinn and C. Adams, Jun. He then told him, &c. If the witness had not previously told plaintiff of these conversations, it is not explained in what manner he came to the knowledge of their having been held. If our impressions and belief be not correct, then the difference in the statements of the witness on the

two trials is so palpable, as to deprive his testimony of much of its weight.

10. That the plaintiff went himself to the Bank with the notes of Gordon, Jun., endorsed by Gordon, Sen., a short time after his conversation with Preval. That he had a private conversation with Milligan, one of the directors, who showed him the report of the committee. What Milligan told him is not in evidence. It is not proved that he had any conversation with any other person in the Bank. The board of directors was in session, or had at the moment adjourned, and a number of them were there. No questions were put to the president, no explanations asked from any one but Milligan, and no pledge required or given, that Gordon, Jun., should not be removed until the notes were paid. No person asked the plaintiff to go to the directors' room; and whilst there, no one desired him to endorse the notes, or used any means to induce him to do it. His most intimate friend was present, and no counsel was asked of him, nor was any control assumed or attempted. He endorsed the notes of his own free will and accord.

11. That a few days after the notes were endorsed, Gordon, Jun., informed the directors, that he had heard from a person not connected with the Bank, that he was to be removed, and he desired to know if that was the determination of the board. They reply, that no such motion had been presented, and no decision of the kind made. There was, no doubt, a strong desire on the part of various members of the board, that the cashier should resign; it was spoken of among themselves, and suggestions made, that the propriety of his doing so should be intimated to him. But no one is said to have given such an intimation, except Milligan, who is dead. In the letter which Gordon writes to the board of directors, he does not intimate that any promise, direct or indirect, was made, that, if he gave his notes for the *deficit*, he should remain in office. He speaks of "having promptly settled, *without* being required, the great loss sustained in the transmission of notes to the branches, to the satisfaction of the direction;" and he hopes, under existing circumstances, that such a course will not be thought of by any director, as it would be a direct censure and impeachment of his integrity.

12. That on the 9th of April the resignation of Gordon was received, to take effect on the 1st of the ensuing month. It is very brief, merely tendering his resignation, and expressing his solicitude for the health and prosperity of the members of the direction. There is no complaint, or intimation of compulsion, or breach of any express or implied engagement. Preval says, that he does not consider the resignation a voluntary one. Bermudez says, he calls it voluntary; but if he had not given it, he would have been removed. Frey says, he was astonished when Gordon told him that he intended to resign. The resignation we must regard as Gordon's voluntary act, as there is no evidence of its being extorted by any violence, menaces, or threats; but we have no doubt that it was caused by his discovering that there was a want of confidence in him, exhibited by the board of directors, or by some of them. Gordon, Jun., was not called on as a witness to state his motives, or the causes of his resignation. We have no doubt, that the plaintiff was informed of the resignation before his departure for France. The fact was publicly known, and from the intimacy of the plaintiff with the Gordons, we cannot believe that he was ignorant of the resignation of the youngest, as cashier. As soon as this resignation was accepted, the board of directors passed the resolution acquiting Gordon of all suspicion attached to his integrity. This was done at the request of Gordon, Jun. Three of the directors, to wit, Preval, Bermudez, and Frey, inform us of their motives in voting for it, which, in effect, are, that there was not sufficient evidence to justify them in saying that Gordon, jun., had embezzled the money or stolen it, so that a criminal prosecution could be maintained against him. They were bound to hold him innocent until he was proved guilty. Whether the other directors were influenced by similar motives or not, the record does not inform us.

13. That some time after the plaintiff endorsed the notes, and Gordon had resigned, to wit, on the 22d April, 1839, he obtained a loan of $20,000 from the Bank, to secure the payment of which in one year, he gave a mortgage on several tracts of land and a number of slaves, "without claiming the right of renewal," and further gave his note with M. Gordon, Sen., and Pierre Soulé, as endorsers for said sum, to bear ten per cent interest, *per annum*,

from maturity, in case of non-payment, which loan fell due in April, 1840, about one month after the first notes of Gordon, Jun., had matured. Within fifteen days after this loan was made, the plaintiff departed for France, and did not return until the month of December.

14. That M. Gordon, Jun., in the month of June, 1839, gave a mortgage on a large quantity of property, to secure the payment of the notes he had given; thereby a second time admitting, his being indebted to the Union Bank. In this act he says, that he gives it to secure the Bank, and to protect the plaintiff from loss in consequence of his endorsements. The benefit of this act the plaintiff afterwards availed himself of, by claiming a mortgage on Gordon's property.

15. That it is proved that, about the time the first of Gordon's notes was becoming due, the plaintiff made proposals to the Bank to discharge it, and the three others not due, also his own debt, and a note of Gordon's, Sen., amounting altogether to more than $80,000, with the bonds of the New Orleans Theatre Company. That the proposal was accepted, and bonds were taken in payment of the notes of the two Gordons, and one year's interest on the plaintiff's own debt for $20,000, for which a delay of a year was given, although expressly stipulated not to be renewable. No part of the principal was exacted, and, in 1841, we find the Bank renewing the debt for both principal and interest, or making a new loan of that sum. The plaintiff, in a letter addressed to the Bank a few weeks after this settlement, speaks of the negotiation of the bonds as arising in a great degree from a wish to oblige Davis, the holder of them. The position of his own affairs he says is brilliant, and he asks a further discount of $12,000.

16. That as soon as the plaintiff had taken up the notes of Gordon, Jun., and got a transfer and subrogation of the mortgage given to secure them from the defendants, he, on the same day, pledged them to the Citizen's Bank, to secure a loan of $26,000, to him by that institution. He subsequently appeared in a meeting of Gordon's creditors, and voted as a creditor, and finally received upwards of $11,000, from the syndic named by

those creditors; and in all other respects he has used those notes, and the mortgage as his own.

The law relied upon by the plaintiff's counsel is very plain. It is, that an obligation without a cause, or with a false or unlawful cause, can have no effect. The cause is illicit, when it is forbidden by law, is contrary to moral conduct, or to public order, and the cause of contract is the consideration or motive for making it. Civ. Code, arts. 1887, 1889, 1890. Pothier on Obligations, Nos. 42, 43. Also, he who receives what is not due to him, whether he receives it through error, or knowingly, obliges himself to restore it to him from whom he has unduly received it. He who was paid through mistake, believing himself a debtor, may reclaim what he has paid; but to acquire this right it is necessary that the thing paid be not due in any manner, either civilly or naturally. A natural obligation to pay will be sufficient to prevent the recovery. Civ. Code, arts. 2279, 2280, 2281. A thing not due, is that which it paid on the supposition of an obligation which did not exist, or from which a person has been released. Civ. Code, art. 2282. The payment from which a party might have been relieved by an exception that would extinguish the debt, affords ground for claiming restitution; but the exception must be such, that it will extinguish even the natural obligation. Civ. Code, arts. 2284, 2285.

Let us see the application of the facts to these principles. M. Gordon, Jun., was the cashier of the Bank, under an obligation faithfully to keep and render an account of every thing committed to his charge, and the plaintiff is surety for his good faith, diligence and honesty. A heavy loss is ascertained to have been suffered; a committee is appointed to ascertain the causes, and they are of opinion, that the loss was occasioned by the negligence of Gordon, Jun.; they tell him so, and he agrees to refund the amount, because he thought the circumstances may have the effect of injuring his character and casting doubts upon his integrity. If the loss was occasioned by the negligence of Gordon, Jun., was there not a natural obligation resting on him to make it good? We think so; and it would probably not be difficult to prove, that there was a legal one also. At any rate, there is nothing unlawful, or illicit in it. Such a promise does

not appear to us to be against good morals, or public order. The negligence of an agent may cause his principal as much damage as his unfaithfulness; and the natural obligation to repair such damage or injury, is as strong in one case as in the other. Gordon, Jun., to save his reputation from suspicion, agrees to pay a sum of money that has never been seen or heard of, since it went into his hands. He says, that he sent it to particular places; but there is no evidence that the money ever was sent, other than his own statement; and it is certain, that it never was received by those to whom it is said it was sent. Under such circumstances there might be doubts and suspicions, and it was his purpose to remove them by paying the money.

Admitting that Gordon's statement be true, that he put the money in the post office, his negligence in the matter was inexcusable. He retained no description of the notes remitted, that in case of loss from the mail they might be advertised. One remittance was alleged to have been made on the 15th November, and two others on the 17th December, 1838; and of the first, and of one of the second, no acknowledgment is made, late in February, 1839; his attention had been called to it by the bookkeeper, but no inquiries were made, or attempts to recover the money set on foot, nor any disclosure made to the directors, until the circumstance was known to the president. He then was authorized to go to St. Martinsville and Natchitoches, to investigate the matter, but never went. If he did, the record does not so inform us. But suppose his statement not to be true, and that he embezzled the money, the situation of the plaintiff is still worse, for he would then be liable as a surety on the cashier's bond.

The first allegation in the plaintiff's petition is, that Gordon, Jun., acknowledged that he was indebted to the Bank $51,500; and the second is, that he (plaintiff) was induced to endorse the notes, because he was induced by the Bank to believe the indebtedness was honest and real. Was it not real? The acknowledgment of a debt presupposes a consideration, and he who seeks to avoid the promise must show the want of it. We have carefully and deliberately examined the evidence in this case, and are satisfied, that there was a sufficient cause, and a just one too, to support the acknowledgment and promise made by Gordon, Jun.

That being settled, it is sufficient to bind the plaintiff. Suppose Gordon, Jun., to have been sued on one of these notes; what exception or defence could he have set up, that would have extinguished the civil and natural obligation on him to pay? We can see none.

The plaintiff says, that he was in no way connected with the business and private transactions of Gordon, Jun. If the duties and obligations which the cashier of a bank is under, to the institution that employs him, be no part of his private business and transactions, it may be true, that the plaintiff had no such connection. The relations of the cashier of a bank towards the institution that employs him, are those of agent and principal. We are not aware that the cashier of a bank is a public officer; and it appears to us, that a person standing in the relation of his surety for $50,000, is rather closely connected with his transactions and affairs.

The allegation, that the Union Bank guarantied that Gordon, Jun., should sell his property for an amount equal to the four notes endorsed by the plaintiff, and that the notes obtained by such sale should be substituted in the place of the four notes, is not, in our opinion, sustained. That Gordon, Jun., made such a promise, and that the plaintiff was informed of it, is certain; but there is no proof that there was such a guaranty on the part of the Bank; and, if there had been, the plaintiff well knew, when he took up the notes, in April, 1840, that Gordon, Jun., had not complied with his promise; and, as he took the notes and mortgage with a subrogation of all the rights of the Bank against him, we consider it a waiver of the guaranty alleged.

The third allegation is, that the Bank repeatedly and unequivocally assured the plaintiff, if he endorsed the notes, that Gordon, Jun., should keep his place of cashier, and that his salary of $8000, *per annum*, should be applied to the payment of them, if it should happen that the property to be sold should be insufficient to cover them. There is no evidence to sustain the latter part of this allegation. Not a single witness testifies to any agreement or understanding, that the salary of the cashier was to be retained by the Bank, and applied to the payment of the notes. The witnesses state how much the salary was, but none of them

say that it was to be applied as alleged. As to the allegation, that there were repeated and unequivocal promises that Gordon, Jun., should be retained as cashier if the notes were executed, we are constrained to say, that the evidence leaves it doubtful. Preval is the only witness who testifies with any directness, and his statement is not very particular. He says that, "when the board was trying to come to a settlement of the *deficit* with Martin Gordon, Jun., the said Gordon was made to understand, that if the settlement was made, he would be permitted to keep his office of cashier." On the second trial he said, "it was understood, at the time the arrangement took place, that Gordon should retain his office of cashier." In what way Gordon was made to understand he would retain his office, or by whom, is not stated. No resolution of the board to that effect is produced. No director is named who told him so. In the letter Gordon wrote to the board, three days after the notes were signed, stating that he had heard he was about being removed, he does not allude to any such promise or understanding, either direct or tacit. He says in his letter, that he understands the cause of his removal was the very sum for which he had given the notes endorsed by plaintiff; and it would be strange indeed, if such an agreement or understanding did exist, and not the slightest allusion be made to it. Frey says, that the plaintiff asked him if Gordon, Jun., would be retained as cashier, and that he replied, that he "saw nothing to the contrary;" but he further says, that "it is not to witness' knowledge, that there was any express or tacit agreement between Gordon and the board, that Gordon should retain his office after the settlement." Bermudez was a director, and he no where testifies to any such agreement or understanding. It is very probable that Preval believed that Gordon would be retained in office, and that he so told the plaintiff; but met, as his unsupported vague statement is, by a disclaimer of any knowledge of the kind by another director, the silence of a third, and the fact that Gordon himself never pretended that there was such a promise, we are compelled to say, that the proof is such as to leave the matter doubtful, and that the plaintiff, holding the affirmative of the issue, must sustain his allegations by sufficient testimony. The plaintiff says, that such was the special agreement; and yet

he never raised an objection as to its being violated, until after he had paid the notes, although he knew that Gordon was not in office, and had not been for many months.

The next allegation is, that at the time the plaintiff endorsed the notes, the directors knew, that Gordon, Jun., could not make the sales of property he contemplated, for anything like the amount of the notes, and that they also knew, that Gordon was insolvent and unable to pay. The evidence in the case does not satisfy us, that the directors of the Bank knew, that Gordon could not make the sales of property he contemplated. The only evidence is, that when he offered a mortgage on his property as a security for the sum of $51,500, proposed to be paid them, they declined taking it, and thereby releasing the plaintiff, and the other securities, from the responsibility supposed to be resting on them. We have said, that there was no contract by which the Bank guarantied that the property should be sold by Gordon, Jun., at all, or for any fixed sum; it is, therefore, immaterial whether he could sell or not. Nor is there any evidence as to the solvency or insolvency of Gordon at the time: that he became so afterwards is true. But, admitting that Gordon, Jun., was insolvent, and so to the knowledge of the directors, we are not informed of any law that forbids them from endeavoring to secure a debt he might owe the Bank, or that required them, when an endorser or security was tendered, to say to such endorser: you must understand, that we know the principal in this obligation is unable to pay it. Such a doctrine, it appears to us, would be entirely reversing the true position of creditor and surety, and make the former the warrantor of the debtor's ability to pay, instead of th e latter. But, in the present case it happens, that the plaintiff did have some warning, for Frey tells us, that Freret told the plaintiff not to endorse the notes; yet he did so.

As to the sixth allegation of the petition, it appears to us, that the directors of the Bank did not, in representing the indebtedness of Gordon as real and arising from a legal cause, do more than the facts authorized them to do. Gordon acknowledged that the Bank had sustained a heavy loss; the committee of directors told him, that it was the result of his negligence, and that he was liable for it; he agreed to it, as Preval, the plaintiff's witness, tells

us. As to the part of the allegation which charges the board of directors with preparing themselves for the dismissal of their cashier, as soon as the security should be obtained, there is not such evidence as satisfies us of the fact. That Chinn and Adams were of opinion that Gordon, Jun., would be removed, we readily believe. Hiriart tells us, that they told him so. Milligan, no doubt, also wished him to resign; but it must be remembered, that there were twelve directors of the Bank, and the votes and opinions of these three, it is not to be presumed, could control those of the other nine. Preval says, that he did not take part in any measure calculated to get Gordon, Jun., out of the place of cashier. Bermudez did not: or, if he did, he does not disclose it; and Frey tells us, that he can give no reason why he should not be retained, and that he was astonished when he heard of the intended resignation. Of the opinions of Adams and Chinn, we have no doubt that the plaintiff was informed soon after he endorsed the notes.

The last allegation is, that the endorsements were obtained by the fraudulent practices and representations of the directors, and by conniving with Gordon, Jun., for the purpose of protecting him from what he considered a dangerous debt; by the assurance that the endorsements were to be nominal, and would be covered by the proceeds of the sales of property, which they knew could not be effected; and by the proffered assurances, that Gordon should be retained in office. This allegation is, in truth, but a recapitulation of all the others.

That fraud may be proved by circumstances, and is more often established in that way, than by direct proof, is no doubt true; simple presumptions, as well as legal ones, may be considered; but like every other allegation, they must be proved. Civ. Code, art. 1842. In this case, we have looked into the evidence in vain for sufficient proof of such fraud, as will annul the contract. Preval says, that he told the plaintiff all he knows of the transaction; and that he knows of no fraud practised, for the purpose of obtaining his endorsements. Bermudez does not speak of any improper means or manœuvres, to impose upon the plaintiff. Frey says, that he gave him all the information he possessed, and that he knows of no improper means used to entrap him. His

counsel has endeavored to prove that the plaintiff was entirely ignorant of everything that was going on. That he was not aware of any difficulty about the lost money, until the morning of the day he endorsed the notes; that he was then told, for the first time, that his name had been offered as security; that he was drawn into the Bank, and there, by outrageous practices and undue means, without any time being given for reflection or consultation, induced to sign his name. This is all a fancy sketch. The plaintiff knew of the *deficit* nearly three weeks before the date of the notes; he told Hiriart of it; and that M. Gordon, Sen., had applied to him to endorse the notes. No person asked him to go to the Bank; he went of his own accord; and had the notes with him, signed by Gordon, Jun., and endorsed by Gordon, Sen. The committee appointed sometime before to examine into the causes of the default, had made their report; it was shown to him; and no director said anything, but Milligan, who was taken aside by the plaintiff, but what conversation took place, is not stated. We can discover from the evidence very different inducements for the plaintiff to endorse the notes, and thus settle the *deficit*. He was cramped and harrassed for money; he had $85,000, of "floating debt" pressing on him; he wanted to borrow $35,000, from the Bank. He knew well that, if he was sued on the bond of Gordon, Jun., as surety, he could not obtain the loan. He was the intimate personal friend of M. Gordon, Sen.; was his endorser for $40,000; and he (Gordon, Sen.,) was endorser for Gordon, Jun., for more than $25,000, on notes held by the Bank. If the credit of Gordon, Jun., was stopt in bank, the $25,000, would have to be paid up, or Gordon, Sen., must be protested, and his name thus rendered useless on the notes of the plaintiff to the amount of $48,000, and he would be held responsible for $40,000, as endorser on the notes of Gordon, Sen.

We come now to the resolution of the board of directors of the 9th of April, 1839, on which the plaintiff so much relies, to show that the Bank had no legal or just claim on Gordon, Jun. When we take into consideration the terms of this resolution, and the circumstances under which it was adopted, we do not think it is entitled to as much weight as is attempted to be given to it. From the testimony it is clear, that the directors, or many of them,

supposed that the money had been lost, from the negligence only of Gordon, Jun.: some may have suspected otherwise; but they had not sufficient testimony to convince them. Frey says, that he did not believe that Gordon, Jun., had stolen or embezzled the money; he had too high an opinion of him, to believe that of him; but he thought he had been very negligent. Preval and Bermudez both say, that there was not sufficient testimony to support a criminal prosecution for embezzlement; and that as there was not, they were bound to presume the young man innocent. The resolution is, that the confidence of the board in the integrity and honor of Gordon, Jun., is unimpaired in consequence of what had occurred; and they acquit him of any suspicion calculated to affect his integrity. A very honest and correct man may, by negligence and inattention to the affairs of another, entrusted to his management, cause him great damage and loss, and yet not be dishonest; and if the employer or principal did not believe there was any immoral or dishonest motives, he might say so, and yet not acquit the party of negligence, or of his responsibility for it.

But we are satisfied, that the plaintiff was aware of the existence of this resolution, when he paid the notes. It is true, it was not published in the newspapers, until after the plaintiff had left for France, but it was publicly known, that Gordon, Jun., had resigned, and that such a resolution had been adopted. The relations that existed between the plaintiff, and Gordon, Sen., and Jun., were so intimate, that we can scarcely have a doubt that he knew of its existence.

The question upon which this case was remanded for a new trial, left open its whole merits; and the counsel on both sides have so argued it. It has been necessary to consider all the circumstances, both before and after the execution of the endorsements, to ascertain what knowledge the plaintiff had of the whole transaction, and at what time he acquired his information. A careful examination of the two records satisfies us, that when the plaintiff paid the notes, he had a knowledge of all the material facts appertaining to the transaction; and that, being so informed, he voluntarily executed the contract, by paying the notes. He says, he did not get all the information from Hiriart,

until fourteen months after his first conversation with him, which was on the last of February, or the first of March, 1839. The notes were paid on the 29th of April, 1840, just about fourteen months; yet the plaintiff goes on to dispose of the note due, and those not due, as his own property. He gives no notice to the Bank that he had been defrauded. On the 18th of May, 1840, he writes a letter alluding again to the transaction, and makes no allusion to, or complaint of any thing improper, and nothing is heard of imposition and fraud, until July, 1842, although the plaintiff was still doing business with the Bank.

In questions of this kind, we have much respect for the opinions of juries, but we cannot surrender to them our convictions, when called upon to revise their verdicts. If we had doubts, we should let the verdicts weigh much upon our minds; but, as we have none, we are bound to do our duty, and to decide according to the convictions the testimony has made on our minds.

It is, therefore, ordered and decreed, that the verdict of the jury be set aside, and the judgment annulled and reversed; and ours is for the defendants, with costs in both courts.

SAME CASE.—APPLICATION FOR A RE-HEARING.

TIME was applied for in this case, at the last term, by *Roselius* and *Soulé*, counsel for the plaintiff, to prepare an argument on their application for a re-hearing.

MARTIN, J. At the close of the last term, the plaintiff's counsel solicited the indulgence of the court, in order to obtain until the fourth day of last month, time for an application for a re-hearing. It was granted to them, but they have not thought proper to avail themselves of this indulgence. The plaintiff, before the opening of the court, filed an application for a re-hearing, of which he has furnished a copy to each of us.

A close attention to his argument, has not enabled us to discover any point which was not touched upon by his counsel. It is admitted, that he was one of the sureties, *in solido*, of the cashier of the Bank; that there was a very large deficiency, of which

the cashier was unable to give any account. Under these facts, it was difficult to conceive how the plaintiff could escape from the high responsibility which weighed upon him. But the evidence did not establish positively, that the cashier had applied to his own use the funds he could not account for. The plaintiff in his application for a re-hearing, has supplied the deficiency; as he admits, that the funds were applied to the cashier's use.* After this admission, it is difficult to imagine, how the defendants could be charged with a fraud in having received from the plaintiff a sum, which they had an undoubted right to exact from him; and how it could be possible for us to avoid allowing them to retain it.

Re-hearing refused.

PETER L. JORE *v.* THE NEW ORLEANS COMMERCIAL LIBRARY SOCIETY.

Plaintiff having seized, under a fi. fa., a sum in the hands of a third person, as the property of defendants, his debtors, the State intervened, alleging that the amount had been illegally paid to such third person by the treasurer: *Held*, That the payment being unauthorized, the amount should be returned into the treasury.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Greiner, for the plaintiff, appellant.

Rawle, for the Second Municipality, appellant.

Preston, *Attorney General*, for the State.

MORPHY, J. The plaintiff having recovered a judgment in this case, for $444 28, took out an execution, under which he

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* No argument for a re-hearing was presented by the counsel in this case. The grounds on which a re hearing was asked for, were stated in an elaborate petition filed by the plaintiff, in person. In this petition, the plaintiff states: "1° *Que Martin Gordon, Jun., caissier de la Banque de l' Union a pris pour son usage personnel les* $51,000, *qui font la base principale de ce procès, et que ce fait l'était à la connaissance de la directoire, et notamment de ceux de ses membres qui representaient l'état,*" &c.

levied on any moneys, rights or credits of the defendants, in the hands of G. B. Walton, and propounded interrogatories to him pursuant to the act of 1839. Walton answered, that he had in his hands, belonging to the society, the sum of $1000, less the amount of $49 26, paid to Messrs. Norman, Steel & Co., on a judgment they had against the company; said sum of $1000, having been received by the respondent from the State Treasurer, on the warrant of the Governor of the State, given in favor of the defendants, under an appropriation made by the legislature, in 1838, to be expended for the sole purpose of purchasing books for their library. The Second Municipality of New Orleans intervened in the suit, and claimed the $1000 seized in the hands of Walton, alleging that, in June, 1837, the Council of the Municipality had loaned to the defendants $1000, for the purpose of purchasing books for their library, on their agreeing to repay this loan out of the moneys, that might thereafter be appropriated for their benefit, and on their executing their promissory note for the amount, in favor of the intervenors. The Attorney General intervened also, on behalf of the State. He avers, that the $1000, in dispute, justly belongs to the State of Louisiana, as it has been drawn from the treasury without legal authority; that the legislature appropriated this money for the purchase of books for the Commercial Library of New Orleans, and that the same cannot be applied to any other purpose; that the society has become extinct by the non-election of officers, and the failure of the objects for which it was incorporated; and that the library, for which the appropriation was made, had been sold under execution for debt, before the money thus appropriated was drawn from the treasury, &c. There was a judgment below in favor of the State, from which the plaintiff, and the Municipality have appealed.

It appears, that in June, 1837, the defendants applied to, and obtained from, the Council of the Second Municipality, a loan of $1000, to purchase books, which they agreed to repay out of an appropriation of money, which they expected the legislature to make in their favor. They gave their note for the amount advanced, which, not having been paid at maturity, was renewed in 1838, for one year, and is now sued upon by the intervenors. The evidence shows that the defendants gave the Municipality an order on the State

Treasurer, but this order has not been produced, nor is it in any way accounted for, or even mentioned in the petition of intervention. On the 7th of March, 1838, a law was passed, appropriating $1000, *per annum*, for five years, for the purchase of books for the Commercial Library of New Orleans, to be drawn from the treasury upon the warrant of the Governor, on the first Monday of June, in each year, and paid to the secretary of the company. In this act it was provided, that the members of both branches of the legislature, during the period for which the appropriation was made, should have free access to the library. It is shown, that three payments had been made under this law, when it was repealed on the 26th of March, 1842. In June following, the Governor gave his warrant in favor of the secretary of the society, for the $1000, in dispute; but the amount was not drawn out of the treasury until the 13th of January, 1845, long after the repeal of the act authorizing its payment. James B. Walton was president of the society in 1842, and continued to act as such until December of that year, when another election appears to have taken place; but neither the president, nor the board of directors, ever entered upon the discharge of their duties. In March, 1843, the books and other effects of the defendants were sold on execution, at the suit of one of their creditors, and from that period, the uses and purposes for which the corporation was created, seem to have been abandoned. By some means or other, the warrant issued by the Governor got into the possession of Norman, Steel & Co., who had obtained a judgment against the Library Society, for $49 26, before one of the city courts. James B. Walton, being apprized of the fact, redeemed the warrant by paying their claim, and on the 13th of January, 1845, received its amount from the State Treasurer.

We can see on the record, no evidence of any transfer or assignment of the fund in dispute, to the Second Municipality. The debt of the defendants to them, was created before the appropriation was made by the State. Their order on the State treasury, if any was really given, can be considered only as a promise, or agreement on their part, to repay the loan out of the expected appropriation, which could be drawn only in the manner pointed out by law; but should this order be viewed as a transfer, or as-

signment, it must have been intended to apply to the appropriation of 1838, not to that of 1842; and the transfer, moreover, could be binding as against third persons, only in case notice had been given to the party who was to pay the money. As the case stands, the Municipality has shown no legal right or title to the fund seized. The claim of the plaintiff, is a fair and legitimate one against the defendants, being for his services as their librarian; but the question is whether, under the circumstances of the case, it is to be satisfied out of the $1000, levied upon. It does not appear to us, that the library society can be considered as legally extinct, from the mere fact of their failing to make their annual elections, as there is nothing to prevent them from organizing anew, by appointing their officers; but it is evident, that since the sale of their library, they have abandoned all idea of so doing; and that, in point of fact, and to all practical intents and purposes, the body they formed may be looked upon as dissolved. The appropriation made by the State, was for the special purpose of buying books for the use of the library annually; and it belonged to the society only for that particular purpose, and for none other. If, from any cause whatever, it cannot be so expended, it cannot and should not be otherwise applied. But even were it not so, the law making the appropriation, was repealed before the warrant of the Governor was made, in June, 1842, and it was paid only in January, 1845. Walton had no right or capacity to receive the money from the treasury, and there was no law in force directing its payment to him, or to any body else. Had the Treasurer been informed of all the facts connected with the issuing of the warrant, the disorganized state of the society, and the want of authority of J. B. Walton, who had long since ceased to be one of its officers, he would have been fully justified in refusing to pay such warrant. We think then, with the Judge below, that the money seized should be returned into the treasury, as its payment was unauthorized, and as it can no longer be applied to the uses and purposes for which it was originally appropriated.

Judgment affirmed.

The State v. The Judge of Probates of West Baton Rouge.

An appeal may be claimed as a matter of right, from a judgment homologating a final and notarial act of partition of property, formerly held in community between the applicant and his deceased wife, where the amount is sufficient to give jurisdiction to the Supreme Court. It is no ground for refusing the appeal to allege, that the act of partition has been made in conformity to previous decrees of the Supreme Court, between the same parties, having the force of *res judicatæ*, and that it is but the carrying into execution of such previous decrees. C. P. 565.

Per Curiam; whether anything has been done by the notary, or by the judge in homologating the report, in violation of the legal rights of the parties as settled by previous decrees, are questions which can only be examined on the appeal of the party who thinks that he has been aggrieved.

Petition for a rule on the Judge of the Court of Probates of West Baton Rouge, to show cause why a *mandamus* should not be issued, directing him to allow an appeal from a judgment of partition of the property formerly held in community between John Nolan and Marie Rose Josephine, his deceased wife, and for an order enjoining all further proceedings until the matters in dispute can be disposed of on appeal. The petition was presented on the 2d of July, 1845, and an order made allowing the rule, and "a writ of injunction to have its effect only on the filing, in the lower court, by the applicant, of a bond with good and sufficient security to the inferior judge, in the sum of ten thousand dollars, conditioned to secure the payment of the damages which may be sustained by the applicant's adversary, in case it should be hereafter proved that the injunction was wrongfully obtained."

Brunot, for the applicant, cited *Stokes* v. *Stokes*, 6 Mart. N. S. 350.

Favrot, Judge of Probates of West Baton Rouge, showed cause against the rule.

Robertson, on the same side, contended, that no appeal could be allowed, citing Code of Pract. arts. 618, 623, 629. 7 Mart. N. S. 347.

Simon, J. The petition of John Nolan states, that on the 16th of June, 1845, a final judgment of partition was rendered and read in the Court of Probates, of the parish of West Baton Rouge, by the Judge thereof, in the suit of P. P. Babin against the petitioner. That the object in dispute, and the amount of said judgment,

far exceeded the sum of $300. That said judgment was rendered on the motion of the plaintiff Babin, to which the applicant filed his answer in writing, objecting to the rendition and recording of said judgment upon good and sufficient grounds. That the Judge overruled said objections and grounds, and was proceeding to sign the judgment, when the applicant, by his counsel, filed his motion and grounds for a new trial, which were also overruled on the same day, to wit, the 23d of June, 1845. And that said judgment is a final one, rendered in all the matters of partition submitted to the notary, and in opposition to the legal rights of the applicant, which he has a right to appeal from to this court, in order to have the same corrected.

He further complains, that having made a motion for an appeal from said judgment to this court, offering the security required by law to suspend the judgment, said appeal was refused by the Judge; and the applicant was deprived of the right of having said judgment suspended and the errors of the same corrected, &c. He, therefore, makes application to this court for a writ of *mandamus* to issue, addressed to the Judge of the Probate Court of the parish of West Baton Rouge, directing him to grant said appeal, and enjoining all further proceedings on said judgment until the matters therein adjudged upon, can be heard and finally determined by this court, &c. Whereupon a rule to show cause was issued and served upon the Judge, *a quo*, who filed his answer to the same substantially as follows:

He first alleges, that the judgment complained of was rendered and read in consequence of the applicant's prayer, contained in a petition by him filed on the 17th of February, 1845, in which he asked that the first proceedings had in the matter of homologating the partition, should be set aside and annulled, and that a new judgment be rendered and read in open court; to which demand the plaintiff Babin consented, and said judgment was rendered, read and signed accordingly.

The Judge further states, that the applicant could only object to the manner and form in which the act of partition was conducted and made, as all the other matters and points in controversy had been previously decided upon by the inferior court, whose judgments were confirmed, on divers appeals, by the Su-

preme Court. That the applicant's main object in these proceedings, is to protract the cause, and in the mean time to enjoy and keep in his possession the property of the plaintiff. That this is fully shown by the applicant's conduct in the course of this litigation, and in various instances to which the Judge bitterly alludes, and refers to as within our knowledge. That, on our referring to the proceedings in the partition, to the two petitions already referred to, to the act of partition itself, and to the several judgments of the Supreme Court, it will be seen, that there is no truth in the said two petitions, and that the inferior court could not have been justified in granting to the applicant a new trial, and appeal, as by him prayed for; and that, under a decision of that court, pronounced on a similar application between the same parties, and a part of which he quotes in his answer, he, the Judge, could not for a moment suppose, that this court would again intervene in the matter, so as to prevent the lower court from executing their former decrees.

The Probate Judge further proceeds to state his views on the principal subject of the controversy, under certain articles of the Civil Code, which he quotes; alludes to the injunction heretofore obtained by the applicant from the court of the Fourth District; and refers us to a certain fact shown by the previous proceedings, as being contradicted by the statements made by the applicant in his petition of the 23d of June, 1845, &c.

Notwithstanding the unfavorable circumstances under which the applicant appears to present himself before us, and the alleged, and even apparent attempt on his part, to protract this litigation, although most of the principal, nay perhaps all the matters in controversy between him and his adversary have been finally settled by divers judgments of this court, which have acquired the force of *res judicatæ*, yet the only question which we have to consider in this application, under the allegations contained and sworn to in his petition for a *mandamus*, is, whether he has a right to an appeal from the judgment homologating the final and notarial act of partition of the estate formerly in community between him and his deceased wife?

It may be true, that the act of partition reported to the Court of

Probates, and homologated by the judgment complained of, was made wholly in accordance with the divers decrees of this court, as they were progressively rendered on the appeals of the parties; and that, having the effect and force of *res judicatæ*, these judgments cannot any longer be inquired into, and must stand as law between said parties. It may be also true, that on examining the report of the notary, and the judgment from which an appeal is sought to be obtained, it will be found, that the appellant has no ground of complaint, and that the final proceedings complained of, are merely the carrying into execution of all our previous judgments; but how can we ascertain the correctness of the inferior judge's position in refusing the appeal prayed for, unless we examine the case on its merits, and inquire into the manner in which the notary has proceeded to make the partition under the legal rules recognized in our previous judgments? This we are not allowed to do on mere application for a *mandamus;* for, it would be inquiring indirectly into the correctness of the very judgment from which an appeal is sought to be taken; and as our laws have provided the penalty which an appellant is to incur, in case of his taking a frivolous appeal, (Code of Pract. art. 907,) and as it suffices that a judgment be a final one within our appellate jurisdiction, to be subject to be appealed from, (Code of Pract. art. 565,) our saying now, that the applicant has no right to his remedy by appeal from the final judgment by him complained of, would perhaps amount to a denial of justice, and would be pronouncing indirectly, upon the very grounds which the appellee might rely on to sustain the judgment appealed from, if the case was brought up before us by a regular appeal.

The judgment from which the applicant seeks to obtain an appeal to this court, does not merely order the execution of our decrees; it homologates the report of the notary to whom the final partition was referred, and settles finally the rights of the parties thereto. Whether such final partition was made according to, and under the principles and rules established in our former decrees, and whether anything has been done by the notary or by the Judge, *a quo*, in homologating the report, in violation of the legal rights of the parties, as previously settled by the judgments of this court heretofore rendered between them, are questions

which cannot be inquired into but on the appeal of the party who conceives that he has been injured, and who seeks redress at our hands; and, to say at once, that the report and judgment complained of, without their being appealed from, are correct and ought not any further to be examined by us, would be presuming and taking for granted that the appeal would be frivolous, and declaring that the party who intends to appeal, is not entitled to the sacred and constitutional right of showing and obtaining the correction of the errors which may have been committed below to his prejudice. Again, this would be a denial of justice.

In the case of the State against the same Judge, decided in June, 1844, (8 Rob.) we discharged the rule, because the judgment or order sought to be appealed from was one merely ordering the execution of a judgment of this court; and because the applicant was precluded from claiming at our hands, any alteration or modification thereof, and, *a fortiori* from opposing its execution. But the case here is very different. According to art. 1290 of the Civil Code, the contestations arising between the parties in the course of the partition, were referred to the court, *a qua*, and to us, and decided upon previously to making the final partition. Those matters in controversy were settled by our different judgments, which so far as they go, must necessarily form *res judicatæ* between the parties; but the partition never was finally made until the report of the notary was homologated by the judgment complained of, and sought to be appealed from; (Civ. Code, arts. 1296, 1297, 1298, 1299;) and it seems to us that, as said partition and judgment are intended to be final, and as either of the parties has a right to show by appeal therefrom, that his legal rights, as settled by our previous decrees or judgments, have been violated, or have been disregarded, or that the final partition has not been made in conformity therewith, either should be allowed to bring his case before us by appeal; in order that if any error has been committed to his prejudice, it may be corrected; and that we may be enabled to ascertain, if the judgment complained of is strictly within the meaning and application of our previous decisions. It is clear, that no change can be made in the rights of the parties as settled at different times by our judgments, and that our said judgments are the law under

which the final partition was to be made; but whether the final judgment does not go beyond, or is not contrary to the rules by us established in the adjustment of their rights, is a question which cannot be inquired into but on the appeal of the party who, deeming himself aggrieved thereby, alleges that it contains errors to his prejudice.

We are of opinion that the appeal applied for should have been granted.

Rule made absolute.

The State v. The Judge of the District Court of the First District.

The syndics of an insolvent having presented a *tableau* of distribution, certain items for syndics' commissions and sums paid to the attorney of absent heirs and for clerk hire, were rejected, either wholly or in part. One of the syndics prayed for a suspensive appeal, which was refused on the ground that his separate interest was not sufficient to entitle him to an appeal. On a rule to show cause why a *mandamus* should not be issued, the judge, *a quo*, showed that since the appeal was refused to the first applicant, a petition for an appeal from the same judgment had been presented by the two syndics and allowed generally. *Held*, that two appeals cannot be allowed to the same person from the same judgment, and that the rule must be discharged.

Rule by L. Millaudon on the Judge of the District Court of the First District, to show cause why a *mandamus* should not be issued, directing him to allow an appeal from a judgment in the matter of *Paul Pandelly* v. *His Creditors*.

Bodin, for the rule.

Buchanan, Judge of the District Court of the First District, showed for cause, that the interest of Millaudon alone was insufficient to entitle him to an appeal; and that, since the appeal was refused to Millaudon individually, a petition for an appeal from the same judgment had been presented by Millaudon and Le Carpentier, as syndics, which had been allowed.

Graihle, on the same side.

Simon, J. This is an application for a *mandamus*, to be directed to the Judge of the District Court of the First District, commanding him to grant the suspensive appeal applied for by

Laurent Millaudon, in his own individual right, from a judgment rendered by the said court on the 16th of August last, in the matter of *Pandelly* v. *His Creditors*, by which the petitioner deems himself aggrieved.

It appears from the allegations of the petition, that the Judge of the District Court, for certain reasons given at the foot of the petition of appeal to which the appeal bond was annexed, refused to grant the order; but the applicant considers that he is entitled to obtain said order for a suspensive appeal, on the ground that, being one of the two syndics of Pandelly's creditors, and as such, having jointly with his colleague, presented for homologation an account and *tableau* of distribution, wherein, among other items, the syndics are put down for certain sums of money, all amounting to $635 78, being three items relative to the amount of their commissions, to the payment of a certain sum to the attorney appointed to represent the absent creditors, and to an allowance by them made to a clerk whom they had employed, the said sums were rejected, either partly or *in toto*, by the judgment complained of.

The applicant further states that, independently of the interest which he has, as one of the syndics, to support the *tableau*, he has a personal interest in maintaining: 1. the amount accruing to him as syndic; 2d. the sum paid to the attorney of the absent creditors, inasmuch as that item, being disallowed below, is made to bear on the syndics individually; 3d. the amount allowed to the clerk whom the syndics had employed, whose salary, if disallowed, would diminish, *pro tanto*, the applicant's commission: and he accordingly represents that one-half of the sums in controversy, being above $300, he has a right, separately from his colleague, to insist on his constitutional right of appeal.

It further appears, that when the petition of appeal was presented by the applicant to the Judge, *a quo*, the latter refused the appeal, because, in his opinion, the petitioner had not shown to the court an interest in himself, sufficient in amount, to entitle him to an appeal from the judgment. But the Judge says: "at the same time this court will allow an appeal to the two syndics from the judgment on the two items of syndics' commission, and allowance to the attorney of absent creditors, these two items

being collectively above three hundred dollars in amount, the court considering that the syndics have an appealable interest from the judgment on those two items."

The answer of the Judge to the rule, shows for cause the same reasons which he wrote at the foot of the petition of appeal; but further suggests, that after an appeal had been refused to the applicant in his individual capacity, *a petition of appeal from the same judgment was presented on behalf of the two syndics of Pandelly, and that the appeal was granted.* The Judge refers us, also, to the record in the District Court, or to the transcript in the Supreme Court.

Were we disposed to agree with the applicant's counsel, that his client has a right, apart from his colleague, and in his personal name, to appeal from the judgment homologating the *tableau* of distribution, filed by them jointly, so far as it affects his individual interest, still, it is clear, that the circumstance of the two syndics having collectively presented a petition of appeal from the same judgment, which appeal, the Judge says, was granted, must preclude him from obtaining another appeal from it, or from any part thereof. Two appeals cannot be allowed to the same person from the same judgment; and, as it appears from the Judge's answer, that the appeal subsequently applied for by the applicant and his colleague, as syndics, was granted generally, and without any limitation in its effect, we cannot see the propriety of permitting any one of them to bring up the case a second time before us, for the special adjustment of certain matters passed upon in the same judgment, though they be relative to his individual interest. An appeal taken from a final judgment cannot be divided, unless, perhaps, when such judgment provides for distinct interests, with regard to distinct parties; but when a party complains of errors in a judgment in which he is interested, and from which he wishes to appeal, it seems that, after the appeal has been granted, he cannot be restricted in the exercise of his remedy, and that, following the course adopted in the inferior court, he should have the right of presenting his case in the same manner and of pointing out to the appellate tribunal the errors committed below, as well to his individual prejudice, as to the injury of those whom he may represent.

Rule discharged.

Marie Louise Andat, Curatrix *ad hoc*, &c. *v.* Hypolite Gilly, Curator of the Succession of Jean Baptiste Lagarde.

In a suit for freedom instituted against the curator of a succession and the tutrix of the heirs, judgment was rendered in favor of the plaintiff, and the tutrix alone appealed, without making the curator a party: *Held*, that the demand of the petition was indivisible, and the judgment a joint one; that it cannot stand as to the curator and be reversed as to the heirs; that no appeal having been taken by the curator within the time prescribed by law, the judgment had become final as to the succession; that the heirs, being minors, could accept the succession only with the benefit of inventory, and, as beneficiary heirs, were entitled only to the residue of the estate after the payment of the debts, (C. C. 1051;) that this residuary interest gave them no authority to represent the succession, and that their separate appeal could not prevent the judgment from becoming final against the estate; and that as the succession, in consequence of the judgment having become final, is concluded thereby, the appellants are also concluded. Appeal dismissed.

Appeal from the District Court of the First District, *Buchanan*, J.

Pepin, for the plaintiff. The appeal should be dismissed for want of proper parties. 3 La. 304. *Cox* v. *Rees*, 16 La. 109. *Linch* v. *Brewer*, Ib. 247. *Kohn* v. *Wagner*, 1 Rob. 275. *Drew* v. *Atchison*, 3 Rob. 140. *Garcia et al.* v. *Their Creditors*, 3 Rob. 436. *Duggan* v. *Lizardi*, 5 Rob. 225. *Dumas* v. *Lefebvre*, 10 Rob. 399.

Canon, for the appellant.

Morphy, J. The petitioner having bought two young mulatto girls, Amelia and Cidalyse, at a probate sale of the succession of the late Jean Baptiste Lagarde, caused herself to be appointed curatrix *ad hoc* to these minors, and immediately brought this suit on their behalf, to have them declared free. She alleges, in substance, that the deceased, J. B. Lagarde, several years ago placed in her hands these girls, declaring to her that they were free, and that they were his natural children; that according to his wishes she raised them in the best manner she could, and acted towards them as a mother; that, in June, 1829, Lagarde purchased Amelia with her mother, who was a slave, for the purpose of emancipating them, as he repeatedly declared to a number of persons, and that since this purchase he had, by

the same mother, the other child Cidalyse; that a short time after, the mother of these children died in New Orleans, since which time, up to the time of his death, in 1840, the said Lagarde suffered these children to remain in the full enjoyment of their freedom, and placed them under the care of various persons of trust, uniformly declaring them to be free persons; that by these acts and doings of their natural father, and by their enjoyment of their liberty during more than ten years, these children have acquired their freedom; and that she (the petitioner) purchased them at auction, for the purpose of testing their right to be set free. By a supplemental petition, the two minor children of Jean Baptiste Lagarde were made parties defendants to this suit, through their natural tutrix, Athenais Dimitry, the widow of the deceased. Some exceptions taken to the plaintiff's right to sue, having been overruled, the curator of the estate and the heirs pleaded the general issue; and averred, that Amelia and Cidalyse were the children of a slave named Adelaide, whom Lagarde purchased from Alexander Cabaret, &c.; the case was tried before a jury, who brought in a verdict in favor of the plaintiffs. A judgment having been accordingly entered up declaring them to be free, the tutrix of the minor heirs of Lagarde alone appealed.

The first question which presents itself is, whether on the appeal of the minor heirs of J. B. Lagarde, and in the absence of their co-defendant Hypolite Gilly, the administrator of the estate, we can inquire into the correctness of the judgment rendered below in favor of the plaintiffs. It would be perhaps desirable that, in all cases, the same parties should be brought before us, who were parties to the judgment below, as we have the power to render such judgment, as should, in our opinion, have been given in the court of the first instance. In ordinary suits on contracts for the payment of money, where the judgment is several, no inconvenience or difficulty can result from one defendant appealing and not bringing up his co-defendants; but in cases of warranties, partitions, &c., the propriety of joining in the appeal all the parties to the suit below, is apparent. As a general rule we have long since held, that he who appeals must bring before us all the parties, contradictorily with whom the judgment complained of was rendered, and who have an interest

that it should remain undisturbed. It may be said, that the present case does not come within the rule, because the judgment appealed from is against Hypolite Gilly, as curator of the estate of J. B. Lagarde, and that he has, as well as the appellants, an interest that it should be reversed. This is true; but the question involved in this controversy is *liber vel non;* the demand of the petitioners is indivisible; the judgment, therefore, that has been rendered upon it is joint as against the several defendants; it cannot stand as to one of them, and be reversed as to the others. When a party against whom a judgment is rendered fails to appeal from it within the legal delays, such judgment acquires the force of *res judicata*, and can no longer be inquired into or disturbed. Now more than three years have elapsed since the rendition of the judgment in this suit. Hypolite Gilly, was the legal representative of the succession of Jean Baptiste Lagarde. This suit could have been brought, as it originally was, against him alone. The judgment then obtained by the plaintiffs has became final against the estate, and all those claiming under it. The record does not show whether the appellants have accepted the succession of their father, J. B. Lagarde; but whether they have or not, they could accept it only with the benefit of inventory. As beneficiary heirs, they are entitled only to the residue of the estate, after the payment of all its debts. Civ. Code, art. 1051. This residuary interest gives them no right to represent the estate which is under the administration of Gilly, their co-defendant; and their separate appeal has not had the effect of preventing the judgment below, from becoming final against the estate of Jean Baptiste Lagarde. The appellants in their own right, set up no claim to the plaintiffs as their slaves. Whatever interest they may have in relation to them, is derived from the succession of their father, as his beneficiary heirs. If the judgment below has become final so that the estate can no longer set up any claim to the plaintiffs as slaves, it is clear that the appellants are without any right to do so. Under this view of the matter, and as the case stands before us, we are unable to perceive what relief we can afford in the premises. *Dumas et al.* v. *Lefebvre et al.* 10 Robinson, 399.

Appeal dismissed.

William T. Thompson *v.* James Nicholson and others.

Plaintiff, who had been appointed a port warden in place of defendant, was enjoined from exercising the functions of the office, on the ground that his appointment was illegal. Pending the action, defendant discharged the duties and received the fees of the office. The injunction was dissolved, and plaintiff declared to have been legally appointed. Plaintiff did not take the oath required to qualify him to act as a port warden till after the dissolution of the injunction. In an action on the injunction bond, for damages: *Held*, that plaintiff had no right to act as a port warden until qualified by taking the oath of office; that the injunction did not restrain him from taking the oath; and that defendant, having a right to act until plaintiff had qualified, no damages can be recovered by the latter.

Appeal from the District Court of the First District, *Buchanan*, J.

Larue, for the plaintiff.

F. B. Conrad, for the appellants. The case of *Nicholson* v. *Thompson*, (5 Rob. 367,) only determined the right of the Governor to make an appointment of a port warden. That case did not settle the matter in dispute here. Civ. Code, 2265. Thompson never was legally qualified as a port warden—he had not taken the oath of office; consequently he had no right to demand the fees of office. Bullard & Curry's Dig. 610.

Roselius, on the same side.

Bullard, J. This case grew out of that of *Nicholson et al.* v. *Thompson et al.* reported in 5 Robinson, 367, in which we decided, that the plaintiff was constitutionally appointed one of the wardens of the port of New Orleans. That action was commenced by an injunction restraining the defendants from acting as wardens, until the legality of their appointment should be judicially determined. The injunction was dissolved by a decree of this court, and the plaintiff now sues both principal and sureties on the injunction bond, &c. Having recovered a judgment in the District Court, the defendants appealed.

The appellants rely mainly upon the point, that, although the plaintiff was constitutionally appointed according to the judgment of this court, yet he never was duly qualified to act as port warden by taking the oath required by law, and, consequently, not authorized to enjoy the emoluments of the office; and that the

defendants, who were the incumbents, had a right to continue in the discharge of its duties. It is not pretended that the plaintiff took the oath of office as required by the constitution and laws, until after the injunction was dissolved; but it is urged by his counsel, that the Supreme Court has already decided, that he was one of the port wardens, which implies, as well his qualification to enter upon the discharge of the duties of the office, as his legal appointment. Of this opinion was the District Court, who decided that the judgment of this court is *res judicata* upon that point.

We are of opinion that the court erred. The only question presented by the pleadings and decided by us, was, the legality of the appointment of the plaintiff, without a previous removal from office of the incumbent by an address of the General Assembly, as provided by the constitution. The right of the defendant in that case to receive the fees of office is expressly denied by the plaintiffs, and the defendant (the present plaintiff) denied the plaintiffs' cause of action, and that they were entitled to the remedy demanded; and he averred, that he had been regularly and constitutionally appointed one of the port wardens of the port of New Orleans, the effect of which appointment had been, to supersede the commissions held by the petitioners, and that their functions had ceased. Thus the question as to the appointment alone, was made by the pleadings. None other was discussed on the argument in this court; and the judgment pronounced by us settled none other. The injunction was dissolved; but even after the dissolving of the injunction, the new wardens had no right to act until duly qualified by taking the oath of office. The injunction did not restrain them from taking the oath, but from performing any of the duties of the office; until then, the incumbents had a right to act, and to enjoy the emoluments of office.

It follows from these principles, which we think clear, that the plaintiff failed to enjoy the emoluments of his office, not because he was enjoined by the incumbents, who, even without such an injunction, would have had a right to continue in the discharge of its duties, but because he was not qualified to act by taking the oath of office. It is a case of *damnum absque injuria.*

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and ours is for the defendants, with costs in both courts.

Walter Brashear *v.* Roland G. Hazard.

Where a promise has been made, a just cause will always be presumed. It is for the party promising to exonerate himself, by showing that it was without any just or legal cause.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

Robinson, for the plaintiff.

Hornor and *Hamner*, for the appellant.

Martin, J. The defendant is appellant from a judgment by which the plaintiff has recovered the price of a sugar mill. The facts of the case are these: The defendant had purchased this mill from Dufilho, who gave him an order for the delivery thereof. He afterwards sold it to the plaintiff, and delivered him Dufilho's order. Two years after, the defendant, upon the representation of the plaintiff that he had lost or mislaid the original order, gave him a second. At or about the same time, an agreement took place according to which, as the plaintiff states in his answers to the defendant's interrogatories, he received the second order, on the defendant's representation that he had ascertained where the mill could be had; and he was to be refunded $250, out of the $400, which he had paid for the mill, in case it were found, and the whole price, if it was not. Plaintiff further states in his answers to the interrogatories that, two or three weeks after receiving the second order, he went in person to the place where the mill was to be delivered, and was informed that there was no mill there, nor had been for two or three years; and that shortly after, and the first time he met with defendant, he notified the latter of his inability to obtain possession of the mill.

It is clear, that the delivery of the original order was that of the mill, unless the plaintiff was able to show, that he had failed to obtain possession, notwithstanding the use of proper diligence. The defendant, however, knowing where the mill could be found,

was bound to disclose it, and to afford to the plaintiff the means of obtaining it. This was endeavored to be effected by the delivery of the second order, accompanied by a promise to return part of the price if the mill was found, and the whole, if it was not. The plaintiff, on receiving that order, made a vain application for the mill, and gave timely notice of his unsuccessful attempt. All these result from uncontradicted answers to interrogatories, and must be taken as proven.

The only question which the case presents is, whether the defendant, having been discharged of his obligation to deliver the mill, by the delivery of the original order, and the subsequent conduct of the plaintiff, became liable to damages under the second agreement, the consideration of which is not shown. This question was decided in the case of *Barrow* v. *Cazeaux*, (5 La. 72,) in which we held, under the authority of Toullier, that a just cause is always understood, unless the contrary be proved; and that, when a promise is shown, it is for the party promising to discharge himself from its effects, by showing that it was made without a just and legal cause.

Judgment affirmed.

SUCCESSION OF ALEXANDER MILNE—François Feuillas Dorville, Dative Testamentary Executor, Appellant.

APPEAL from the Court of Probates of New Orleans, *Bermudez*, J.

Preston, for the petitioner.

Canon, *S. L. Johnson*, and *Janin*, for the appellant.

MORPHY, J. The petitioner, James McGill, claims of the estate of the late Alexander Milne $1440. He alleges that, on the 6th of November, 1840, F. F. Dorville, the dative testamentary executor of the estate, authorized and employed him to guard and take care of the extensive estate and possessions of the deceased, on the margin of lake Ponchartrain, called Milneburg. That his duties consisted particularly in guarding several hundred acres of woodland belonging to the estate, from the depredations it was exposed to on account of its proximity to the

city. That he was also employed to prevent the carrying away of shells and sand from the shores of the lake, in front of said property, and to take care of the houses and buildings of the estate. That he began to render these services on the 6th of November, 1840, and continued faithfully to discharge them until the 6th of November, 1843. The petitioner alleges, that his services are reasonably worth $40 per month, which, during that period, makes the sum of $1440, for which the estate is justly liable to him, &c. It appears that, on the 11th of January, 1836, the petitioner purchased a lot from the deceased at Milneburg, for $1100, payable three years thereafter, with legal interest, from the 14th of January, 1839, which lot, on the trial below, was appraised at $80, by one of the witnesses; that the petitioner, as he alleges, engaged his services to the estate under the expectation that they would compensate, and go to pay, the extravagant price at which the lot had been sold to him. When he was sued on his note in the Parish Court, he pleaded, as an offset, his alleged services to the estate; but this plea was rejected on an exception being taken to the jurisdiction of the court, whereupon the present suit was brought to liquidate and settle his claim against the estate.

To show that he had been employed by the executor, the petitioner produced a paper signed by him on the 6th of November, 1840, wherein he is requested and authorized to take care of all the property belonging to the estate of Milne, and to prevent any person from digging sand on the same. A number of witnesses have testified as to the value of the property to be guarded, and the services rendered by the petitioner. They state that the woodland extended from five to six miles on the shore of the lake, and about three-quarters of a mile in depth, including the town of Milneburg, and a large tract of adjoining land, and that along its whole extent, there was a sand beach and many shell banks, all which property was exposed to depredation from the inhabitants of Milneburg and New Orleans. That, at various times, the plaintiff prevented a great many persons from cutting wood, and carrying off shells and sand from the property of the estate. That he corresponded from time to time with the executor, in relation to the business, denouncing to him all persons

who trespassed on the land, and that he once arrested and put in jail one of the trespassers. The business of guarding this property is represented by the witnesses, as a troublesome and even a dangerous one, which involved the plaintiff in quarrels, and, on one occasion, his life is said to have been threatened by one of the persons who were cutting wood on the land. One witness says, that he would have charged $50 per month for these services, and would not take one year of the trouble plaintiff had, for a lot like that he bought at Milneburg. On the other hand, Chalor, the clerk of the executor, the only witness present at any of the interviews which took place between the petitioner and the executor, says, that there was no agreement to pay anything to McGill; that Dorville had no idea of paying for his services; that he was in the habit of requesting all persons living at the lake, to inform him of any trespasses committed on the lands of the estate. That if a written authorization was given to McGill, it was because he called for it to avoid difficulties with persons who might dispute his authority to stop them. That as plaintiff was on friendly terms with the executor, and had been allowed for some time the use of a house and garden at Milneburg, and the privilege of cutting wood for his own use, the witness supposed that his services were given on the footing of friendly offices, and without any pecuniary consideration; and that it was only after suit was brought against him on his note, that he, for the first time, set up a claim for compensation. In relation to the value of McGill's services, this witness says, that if a man had been employed to render them, and had attended to nothing else, he might have been entitled to a salary of about thirty dollars per month; but that a person living at Milneburg, who should have gone over the land once a month, and enjoyed the privileges accorded to McGill, would not be entitled to more than fifteen dollars per month. Upon the whole evidence, and in the absence of any positive proof that McGill had agreed to give his services to the estate gratuitously, the Judge below allowed him the last mentioned sum. In a case like the present, depending entirely on the testimony of witnesses, and their credibility, we cannot say that he erred.

Judgment affirmed.

The State *v.* Asher M. Nathan.

The Same *v.* The Same.

The act of 26 March, 1842, section 9, imposing an annual tax of two hundred and fifty dollars on money and exchange brokers, is not inconsistent with the constitution of the State, nor of the United States.

Appeal from the District Court of the First District, *Buchanan*, J.

Preston, Attorney General, for the State.

Wilde, for the appellant. The law imposing the tax on brokers is unconstitutional.

First: Because Congress has the exclusive power *to regulate* commerce. The power to regulate, implies the power to preserve. The State cannot have power to destroy or impair what Congress has the power to preserve and regulate; therefore, the State cannot tax the instruments whereby Congress exercises its constitutional powers. 4 Wheat. 428, 432. An unlimited power to *tax*, is a power to destroy. Ib. 428, 432. Exchange is a necessary instrument of commerce. 4 Wheat. 147. 13 Peters, 531, 548, 563, 606. The mind cannot conceive the possibility of carrying on commerce in the present state of the world, without bills of exchange. To tax bills of exchange, therefore, is to tax commerce; and to tax the seller of bills, is to tax the bills themselves. There is no difference between taxing the article, and taxing the faculty to sell it. 4 Wheat. 399. 12 Wheat. 444. All useful regulation does not consist in restraint or taxation. That which Congress, in the execution of their constitutional power, think proper to leave *free*, is as much regulated by them, as that which they restrain or tax. 9 Wheat. 18. Were it not so, it would not be an exercise of the power to lay duties, when certain goods are allowed to be imported duty free. Could the State *tax* the introduction of such goods? Where there is a repugnancy between the State power to tax, and the federal power to preserve, regulate and leave free, the State power must give way. If the State can tax in such a case, Congress is not supreme. 4 Wheat. 429, 432, 433. What sort of concurrent powers are those which can-

not exist together? 9 Wheat. 15. Congress has no power of revoking state laws as a distinct and substantive power. Over those subjects which are within its power, its legislation is supreme, and necessarily overrules all inconsistent or repugnant state legislation. 9 Wheat. 30. Its exclusive power to regulate commerce carries with it the power to regulate exchange, as an indispensible instrument of commerce, and the power being exclusive, a concurrent power in the State is a contradiction.

"Commerce in its simplest signification, means an exchange of gooods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange, become commodities, and enter into commerce: the subject, the vehicle, the agent, and their various operations, become the objects of commercial regulation." 9 Wheat. 229, 230.

Congress no doubt has full power over foreign bills of exchange, even to regulate, and render uniform throughout the Union, the damages upon them when they return under protest; and it has been proposed to exercise it.

The State, therefore, cannot tax, and by taxation exclude, that which Congress has the power to regulate and maintain,—one of the essential instruments of commerce, one just as necessary as ships or steamers.

Secondly: The law is in conflict with the exclusive power of Congress, to *regulate the value of money.*

Josephs and *H. H. Strawbridge*, on the same side.

MARTIN, J. These are two consolidated cases, in which the State has recovered a tax imposed by the legislature, in the year 1842, upon money and exchange brokers. The only question submitted to our consideration, is the constitutionality of the tax. We have been favored with a very long and printed brief, in which the unconstitutionality is sought to be established, on the ground, that the power of unequal and partial taxation was never delegated to the legislature, and that this tax is contrary to the provisions of the constitution of the United States, it being a tax on commerce, which Congress alone has the power to regulate.

It does not appear to us that the District Court erred. The general assembly of this State is vested with all the legislative powers, even including that of unequal and partial taxation, al-

though the State constitution does not grant it in express terms. Its attributes differ in this respect from those of Congress, which are limited to those actually granted. The tax under consideration is not more a tax on commerce, than that on stores and warehouses, &c.

Judgment affirmed.

Succession of Alice Packwood—Samuel Packwood, Executor, Appellant.

Stock in a bank here secured on real estate, acquired before the removal of the spouses from this State, having the same *situs* with the immoveable on which it is a charge, and being transferrable only on the books of the bank situated here, whether considered as a moveable according to art. 466 of the Civil Code, or an immoveable under art. 462, forms part of the community property.

Where a husband and wife, married in another State, remove into this, the laws establishing and regulating the matrimonial community of gains will operate upon the property acquired during their residence here: and where they subsequently remove from this State, its laws will cease to operate upon property afterwards acquired here, such acquisitions becoming the property of the party to whom they may belong according to the law of the new domicil of the spouses.

The executor of the will of one who was domiciliated and died in another State, deriving his powers from a Probate Court of this State, administers only on the property of the deceased situated here; and that part of the estate of the deceased only, is under the control of the courts of this State.

The removal of the husband and wife into another State, does not vest in either spouse any distinct or separate title to one individual half of the community property previously acquired here. So long as the marriage continues, the husband retains his power over the property of the community; he has a right to enjoy its fruits; it is liable for his debts contracted after, as well as before the change of domicil; and he may sell it, if the sale be not fraudulent. On the death of the wife, one half of the property still in existence, acquired during the residence of the spouses here, will vest in the heirs of the wife, subject to the payment of the debts contracted by the husband during the marriage.

The property found at the dissolution of the marriage, constitutes the body of *acquests* and gains.

To annul a sale of community property made by a husband, it is not enough, under art. 2273 of the Civil Code, to show that it was simulated; it must be proved to have been fraudulently made, with a view to injure the wife.

A husband and wife, between whom a community of *acquests* existed in this State, having acquired a plantation which formed part of the community property,

subsequently removed into a State where the common law prevails. After their removal, the husband and wife sold the plantation. After the death of the wife, the husband and the purchaser cancelled the sale; the notes given for the price were returned to the purchaser, and the plantation re-conveyed to the husband. The husband having qualified in this State as executor of his wife, on an opposition to an account filed by him, made by the heirs of the wife, claiming that the retrocession should enure to the benefit of the community, or that the husband should account to the heirs of the wife for one-half of the price: *Held*, that on the retrocession, the title vested in the husband alone; and that if the wife had any interest in the notes, the executor is not bound to account for it here, as both spouses lived in another State at the time, and the fund does not belong to the community.

Where real estate belonging to a community existing between a husband and wife, is sold by the husband, and the spouses afterwards remove from this State, and the wife dies out of this State, the husband will not be accountable here for the price, if not existing here at the death of the wife. *Per Curiam:* The husband is no more accountable for that transaction than for the price of any other property sold by him before the dissolution of the community.

Appeal from the Court of Probates of New Orleans, *Bermudez*, J.

Samuel Packwood, and his late wife, Alice, were married in the state of Connecticut, about 1796 or 1797. In 1804, they removed to this State, where they acquired considerable property in plantations, slaves, lots and houses in the city of New Orleans, &c. In 1836, they removed to the city of New York, where they resided until the death of the wife, in 1840. The husband still resides there. Previously to their removal from this State, they sold, in February, 1836, one undivided half of a plantation, and certain slaves, in the parish of Plaquemine, to their son, Theodore J. Packwood. On the 23d of May, 1840, Samuel Packwood and his wife sold the other half of the plantation and slaves to one Stewart, for the sum of $100,000, payable at one, two, three, four, five, and six years, for which the notes of the purchaser were taken, reserving a mortgage to secure their payment. The sale and mortgage were recorded in the parish of Plaquemine on the 12th of November, 1840. On the 27th of July, 1840, Mrs. Packwood died in New York, having appointed her husband executor of her will, and he qualified as such in the Court of Probates of New Orleans, in December, 1841. On the 27th of July, 1843, Stewart, in consideration of one dollar, and

the return of his notes given for the price, conveyed the portion of the plantation and slaves purchased by him to Samuel Packwood. The statutes and reports were admitted as evidence of the law of New York.

The executor having prayed for the homologation of an account presented by him, Eliza Hearn Dorsey and Frances Holly Nevil, two of the heirs of Mrs. Packwood, opposed the homologation. They allege, that the executor has not accounted for the undivided half of the plantation and slaves pretended to have been sold to Stewart. They allege, that the sale was simulated, and made with the view of depriving them of their rights to said property. They aver, that the property has been since retroceded to Packwood; that such rescission or retrocession must enure to the benefit of the community existing between Packwood and wife, or to the benefit of the heirs of the wife, even though it should be held that the original sale was a valid one. And though the sale should be maintained, and the retrocession declared not to enure to the benefit of the opponents, they allege that the executor will still be bound to account for the price. They pray, that the executor may also be ordered to account for the crops made on said plantation during the years 1840, 1841, 1842, and 1843.

The account was also opposed on the ground, that the executor has neither charged himself with, nor in any manner accounted for, a sum of $90,000, the price of the one-half of the plantation and slaves sold to T. J. Packwood. The opposition alleges, that this amount has been received by the executor since his appointment, or is still due by the purchaser, and that it forms a part of the community property. The homologation was further opposed on the ground, that the executor had not accounted for certain shares of Union Bank stock. The commission paid to an agent for the collection of rents, was also objected to.

The court of the first instance, declared the sale to Stewart to have been simulated, and the property to belong to the community; the executor was ordered to account for the crops made on the portion so sold during the years 1840, 1841, 1842, and 1843; the bank stock was held to belong to the community; and the

claim for commissions, paid for the collection of rents, rejected. From this judgment the executor appealed.

Lockett and *Micou*, for the appellant. The principal ground of opposition rests, First, upon a charge of fraud and simulation in a sale made by Packwood and wife to D. Stewart. Second, upon the assumption that if the sale was valid, the executor is bound to account for the price received for the property as assets of the succession.

1st. As to the alleged fraud: The opponents are the children of the executor, upon whom their opposition charges the fraud. The law will not permit such a charge to be made in court by children against their parents. Civ. Code, art. 233. *Caldwell* v. *Hennen*, 3 Robinson, 20. The opposition is in effect an action, by the opponents against the executor, which they hope to bring under the provisions of article 2373 of the Civil Code. That article gives to the wife an action against the heirs of the husband. It does not give to the heirs of the wife, an action against the husband himself. The wife herself could never sue the husband under pretence of fraud in disposing of the community property. *Tourné* v. *His Creditors*, 6 La. 463. If her heirs could bring such a suit, they would have greater rights than the author from whom the rights were derived. The action of the wife descends to her heirs; consequently her heirs may sue the heirs of the husband, but not the husband himself. If the law meant to give a right of action against the husband himself, it would have been so expressed. We must conclude that the language was not carelessly adopted, and that the law intends that the husband shall never be subjected to such a charge in reference to the community property. *Smallwood* v. *Pratt*, 3 Rob. 132. The clause of art. 2375, which permits this action, is not found in the Napoleon Code. Code Nap. 1421, 1422. It is borrowed from the Spanish law. Code of 1808, p. 336, art. 66. *Dixon* v. *Dixon*, 4 La. 192. The Spanish law would not permit such an action against the husband. It had too high a regard to the peace of families. It took too great pains to inculcate respect from children towards their parents, to permit a suit for fraudulent alienation of property, which the father himself may have acquired by his own industry.

The record contains no proof that any fraud was committed.

With regard to the sale to Stewart, we simply learn that it was made, without any circumstance being shown to cast suspicion upon its fairness. Fraud is never presumed; much less can it be so, under article 2373, which requires the wife alleging the fraud satisfactorily to prove it. As to the re-sale by Stewart to Packwood, it is abundantly accounted for. Stewart had fallen in arrears in his payments. He had got into a serious contro-

versy with T. J. Packwood, who refused to continue as manager on joint account, and had sued for a partition. Packwood himself had sued Stewart for the arrears due. Here is abundant reason to show why Stewart should wish to sell, and Packwood to buy, without any suspicion of fraud being thrown upon the original sale.

2d. The sale being valid, is the executor obliged to include the price as part of the community? As the same question arises under the third ground of opposition, we will consider them both together. Both sales being made in the lifetime of Mrs. Packwood, and with her concurrence, stand upon the same principle. Of course the heirs can claim no property except that which belonged to the community at the moment of its dissolution. Any part of the price of this property previously paid, no longer remained a debt due to the community. The part of the price unpaid, at the death of their testator, is, therefore, the true subject of controversy. The parties were then and before residents of New York. The credit, or right of action to recover the price of property, has no physical or visible place. It is an incorporeal right, and must be considered as existing at the place at which the law gives it. Civ. Code, art. 466. Story's Confl. of Laws, § 362. *Bonneau* v. *Poydras*, 2 Rob. 15, 16. *Stetson* v. *Gurney*, 17 La. 166. *Longbottom's Executors* v. *Babcock*, 9 La. 44. *Hooke* v. *Hooke*, 14 La. 27. The place, or *situs* which the law assigns to moveables generally, and especially to credits, is the domicil of the owner. Story, § 362. Consequently these credits must be regarded as existing in New York, and not in Louisiana. They must consequently be administered and distributed there, not here. This is the language of international law. 1 H. Blackstone, 131, 132. *Harvey* v. *Richards*, 1 Mason, 411. 3 Pick. 128. 2 Kent, 344. Foelix, p. 62, quoting a great number of civil law writers. Livermore, p. 128, § 212. Story's Confl. of Laws, § 146, 159, 171, 177, 178, 184. This court has never adopted the opposite opinion. In the cases of *Saul* v. *His Creditors*, *Cole* v. *Cole*, and *Gale* v. *Davis*, the insolvent or intestate *resided* in Louisiana; consequently there was no law of distribution to govern save that of Louisiana. The question in those cases was, whether certain property acquired while the parties lived in Louisiana, was community property. The principle that the law of the owner's domicil governs as to all rights of heirs so far as moveables and credits are concerned, has been repeatedly recognized. This court has said, that the laws of Louisiana govern *only* property found here. *Cole's Wife* v. *His Heirs*, 7 Mart. N. S. 51. *Saul* v. *His Creditors*, 5 Mart. N. S. 609. That moveables here, belonging to foreign owners, must follow the law of the owner's domicil.—

See *Day and Wife* v. *Thibodeaux*, 5 Mart. N S. 48. *Gravillon* v. *Richards*, 13 La. 298. *Garnier* v. *Poydras*, 13 La. 177. *Succession of Marye*, 2 Rob. 438. *Succession of Robert*, 2 Rob. 436. *Succession of Packwood*, 9 Rob. 438.

The credits or debts due by Stewart and T. J. Packwood at the date of Mrs. Packwood's death, being in contemplation of law in New York, do not come within the operation of the community laws of Louisiana. Whatever rights the laws of New York give to the wife, or her heirs, must be demanded and enforced there. The courts of New York will fully protect the rights of the opponents, and it is not necessary for the courts of Louisiana to decide upon any thing save the distribution of the estate administered here. 2 Story's Equity, § 457, 241. 3 Merivale's Ch. Rep. 67. *Bourcier* v. *Lanusse*, 3 Mart. 584.

A. Hennen, on the same side. The rights in the community of property between S. Packwood and wife, must be determined according to the laws in force, when they removed from Connecticut to Louisiana; that is, the Spanish law, as then in force, prior to the Civil Code of 1808. *Dixon* v. *Dixon*, 4 La. 188. By the Spanish law, the wife could sell to her husband, and renounce, before, during, and after the dissolution of the marriage, her *gananciales*, or rights in the community property. *L'Abbé's Heirs* v. *Abat*, 2 La. 533. Husband and wife may change their domicil, for the purpose of making a valid donation, *inter vivos*, to each other. Pothier, Donations entre Mari et Femme, Nos. 18, 22. And such donations are not a fraud on the law. Ib. Donations of the community property, may be made by the husband in many ways, during the marriage, so as not to be considered fraudulent against the rights of the wife. Pothier, Communauté, Nos. 480, 483, 487, 488. Gomez, Law of Toro, 50, No. 73. 1 Denisart, 621, "Conquests."

The Spanish law is diametrically opposite to the French law, with respect to the effect of the domicil on the marriage contract. By the French law, the domicil governed as to the future acquisitions of the married couple, wherever made, or wherever they might remove. On the contrary, the situation of the property controlled its character, whether community or not, according to the Spanish law. This was the ground of the decision in the case of *Saul* v. *His Creditors*, (5 Mart. N. S. 569,) in conformity with anterior decisions of this court, and in perfect concert with the Spanish jurists. If the principles of the French jurisprudence should be applied to this cause, as contended for by the counsel of the heirs, no community would exist, and nothing could be granted to them. The community is unknown to the laws of Connecticut, where S. Packwood was married. The ar-

gument of the counsel of the heirs is then *suicidal*. See 1 Burge, 619, 620. 1 Froland, 314.

There is nothing in the laws of Spain which prevents the husband from selling the community property, without the consent or approbation of the wife. 1 Febrero, 239, No. 10. He could convert it into money fairly, and remove with it into any other country, just as he could change his domicil. 3 Merivale's Rep. 67. 2 Froland, 1401. Foelix, § 67.

Mrs. Packwood removed voluntarily with her husband, from Louisiana to New York, and could change the law respecting the community, just as she did by removing from Connecticut to Louisiana, and forming the community in the latter state. 2 Poullain Du Parc, 3, 4, No. 2. Mrs. Packwood voluntarily signed the bill of sale of the property in Louisiana, and thereby precluded her heirs from contending that such sale was a fraud on their rights.

Mrs. Packwood having died in New York, her domicil, all the moveable property belonging to her estate, must be administered and distributed according to the laws of that state. No account can be here required of the testamentary executor, of the money which came into his hands in the state of New York. See Foelix, on International Law, § 37, who quotes thirty different writers in support of his propositions. To them it would be easy to add thirty more. Among the most striking, see Casaregis, 4 vol. p. 45, Nos. 63–66. Chopin, on the Customs of Paris, liv. 1, tit. 1. No. 31. 2 Froland, 1294. 1 Bullenois, 340. 2 Kent's Com. 428, 432. Matienzo, 256, No. 30.

The community of *acquests* and gains, was unknown to the Roman law; and though common to all the continental nations of Europe, the laws of Spain introduced many provisions differing from those of France and other nations. See 4th Febrero, 212, chap. 4, § 1, No. 1. 1 Tapia, 96, No. 2. Law of Estilo, No. 203. 5 Theatro de Legislacion, 181. Fuero Juzgo, lib. 4, tit. 2, l. 17. Fuero Real, lib. 3, tit. 3, l. 3. Novissima Recop. lib. 10, tit. 4, l. 3. Consequently by the laws of Spain only, and by her juridical writers, must this case be decided. These writers and laws, as above quoted, decide the question in favor of S. Packwood. See Gomez, on the Laws of Toro, 60 and 50, No. 67. Matienzo, p. 254, No. 60. Partidas, lib. 4, tit. 11, l. 5. Pandects, lib. 24, tit. 1, l. 5, § 13. 1 Asso y Manuel, 96, lib. 1, tit. 7. Cervantes, on the Laws of Toro, p. 123, No. 80.

There is no evidence to support the allegation of fraud against S. Packwood. The allegation of fraud, and the proof of it, cannot be admitted against the plaintiff. The law forbids the children to make the allegation against the father. Partidas, lib. 3, tit. 2, l. 3. Pandects, lib. 5, tit. 1, l. 4.

It abundantly appears, that the sale of the property in Louisiana by S. Packwood, and the removal of the proceeds to New York, were legal and just; and the heirs of Mrs. Packwood have no right of action against their father.

Wilde, for the opponents. The sale from Packwood to Stewart was simulated, and being contrary to public policy and a violation of positive law, it is absolutely void. Civ. Code, art. 2373. Such was the Spanish, French and Roman law. Recopil. law 5, tit. 9, book 5. Nuov. Recop. law 5, tit. 4, book 10. Febrero Capitulo 1, 22, No. 24, vol. 1, p. 201, ed. Madrid, 1783. 1 Toullier, 391, 394. 2 Ib. 464. Pothier, Communauté, Nos. 471, 472. Code Nap. arts. 1422, 1423. Mackeldey, Dr. Rom. § 359, (n. 12,) 502. Zach. Dr. Franc. vol. 3, p. 443, n. 4. Ib. p. 437, 448, 517. *Tourné* v. *Tourné*, 9 La. 450. *Smallwood* v. *Pratt*, 3 Rob 133. 3 Partidas, tit. 7, law 15.

Packwood and his wife having removed into this State, and acquired property here, their rights are precisely the same as if they had *married in Louisiana*, making previously a *marriage settlement* in which they expressly agreed to be governed by the *regime* of *legal community*. *Bryan* v. *Moore*, 11 Mart. 26. *Saul* v. *Creditors*, 5 Ib. N. S. 568. *Tourné* v. *Tourné*, 9 Rob. 453. *Rowley* v. *Rowley*, 19 La. 538. *Dixon* v. *Dixon*, 4 La. 190, 191. *Murphy* v. *Murphy*, 5 Mart. 83. *Cole's Widow* v. *His Ex'r*, 7 Ib. N. S. 42. According to these authorities it is the law of the State, in which the parties were actually domiciled when the property was acquired, that determines whether there shall be a community or not: and when such community arises, as a *legal incident*, it has the effect of an *actual contract* as to all acquisitions within *that state*. Among the continental authors who sustain the doctrine of a *tacit contract* in such cases having all the effect of an *actual marriage settlement*, are Dumoulin, Bouhier, Hertius, Pothier, Merlin, and other authorities quoted in Story's Conflict of Laws, § 146 to 157.

"*La loi n'impose pas aux futurs époux l' obligation de régler leurs conventions matrimoniales par un contrat de mariage. En l'absence d'un pareil contrat, les époux sont censés avoir voulu adopter comme règles de leurs intérêts pécuniers les dispositions du code sur le régime de la communauté légale; et les droits que ce régime attribue à chacun d'eux leur sont acquis d'une manière aussi irrévocable que s'ils les avaient établis par une convention expresse.* Zach. Dr. Fr. tom. 3, p. 393, ed. Strasb. 1839, liv. 1, 2d partie, § 501. *Lorsque les époux ne règlent pas par des stipulations formelles, leurs conventions matrimoniales, les dispositions légales en vigeur à l'époque où le*

mariage est célébré, forment à leur égard un véritable contrat fondé sur leur volonté présumée [cpr. art. 1387. et § 33.] *et les droits qui en découlent sont tout aussi irrévocables que s'ils avaient été expressément stipulés.*" Zach. Dr. Fr. Introd. § 30. tom. 1, p. 53, (n. 6,) quoting Sir. Reg. xiv. 1, 132, Sir. xxxiii. 2. 298. Ib. 489, and other authorities. The only difference between the jurists of France and Holland, and the courts of Louisiana on these points is, that the former hold that the implied or tacit contract, establishing a community, follows the parties wherever they go and regulates even their acquisitions in every new domicil; while the latter maintain, that the tacit agreement is to be regarded, as extending only to their acquisitions in the country where the community of property prevails, and that upon a change of domicil, to a country where it does not exist, *all future* acquisitions are regulated by the law of the new *domicil.* This is clearly stated in *Saul* v. *His Creditors*, and is shown to be the law of Spain, in force here before the Codes.

The almost universal concurrence of opinion, on the continuance of the community, is concisely stated by Burge: "According to the general doctrine of jurists, the property of the husband and wife, whether it be acquired *before or after* the change of of domicil, continues subject to the law of community, notwithstanding they have removed to another country where *that* law does not exist. The change of the *domicil* neither divests them of any right which they had acquired under the law of their matrimonial domicil, not confers on them any right which they could not acquire under that law." "If the law of community existed in their matrimonial domicil, they will not cease to be in community although they should have acquired another domicil in a country where no law of community was established; and, on the other hand, if there was no law of community in their matrimonial domicil they will not become subject to the law of community, because they have taken up their domicil in a country where that law does exist." "The concurrence," he continues, "of jurists is so general in this doctrine, that there are few who have dissented from it," and he quotes a host of authorities at p. 619, 620. 1 vol. "In the opinion of the greater number of jurists, not only the property which had been acquired by the husband and wife before their removal, but even that acquired in their new domicil, is subject to the law of their matrimonial domicil, and their opinion has been sanctioned even to this extent by the decisions in France." 1 Burge, 620, 621.

But it is contended that the matrimonial domicil of these parties was Connecticut, where there is no community. Our answer is the law of Louisiana has established the law of the place of ac-

tual domicil during the acquisition, as the one settling the rights to the property acquired. "Though it was once a question, say this court in *Gale* v. *Davis*, it seems now to be a settled principle, that when a married couple emigrate from the country where their marriage was contracted into another, the laws of which are different, the property which they acquire in the place where they have moved is governed by the laws of that place." 4 Mart. 649. And in *Cole's Widow* v. *His Heirs*, 7 Mart. N. S. 43, 44, the court say: "We then determined [in Saul's case] that the law, or, to adopt the language of the jurisprudence of the continent of Europe, the statute which regulated the rights of husband and wife was real and not personal, that it regulated things, and subjected them to the law of the country within which they were found. It follows then as a consequence that property within the limits of this State must, on the dissolution of the marriage, be distributed according to the laws of Louisiana, no matter where the parties reside: because viewing the statute as real, it is the thing on which it operates that gives its application, not the residence of the person who may profit by the rule it contains."

Let us inquire, then, what was the character of the estate thus acquired: in other words, what is the nature and extent of the wife's interest in community property? Our adversaries say it is a mere expectancy, a possibility only, not an estate or interest. But the wife and her heirs have an action against the husband for any part of the community property fraudulently alienated in prejudice of her rights. Civ. Code, art. 2373. *Tourné* v. *Tourné*, 9 La. 458. *Smallwood* v. *Pratt*, 3 Rob. 133. Zachariæ says—*La femme est même durant le mariage co-propriétaire actuelle de tout ce qui compose le fonds commun.* 121. *Néanmoins le mari est tant que dure la communauté réputé propriétaire exclusif de ce fonds au regard de ses créanciers et de ceux de sa femme.*—Zach. Dr. Fr. tom. 3, p. 408, ed. Strasb., 1839, liv. 1, 2 partic, § 505. To this is appended a note: "Duranton 14, 96. Bathur, 1 64. M. Touillier, 12, 75, *et suiv. soutient, en invoquant l'opinion de Dumoulin, Consuetudines Parisienses*, § 37, *No.* 1 *Novæ Consuetudines et* § 109, *No.* 3, *Veteres Cons. et de Pothier No.* 3, *que la femme n'est point, durant la communauté co-propriétaire du fonds commun, et qu'elle n'a qu'une simple expectative de co-propriétaire, expectative qui s'évanouit ou se réalise selon qu'elle accepte la communauté ou qu'elle y renonce. Mais Dumoulin et Pothier, qui paraissent d'ailleurs avoir eu principalement en vue les rapports des époux envers les tiers, sont loin de s'exprimer sur la question d'une manière aussi explicite que le fait M. Toullier. La thèse que soutient cet auteur est contraire*

au langage de nos anciennes coutumes, et à celui du Code Civil. Aussi s'est il cru obligé de critiquer comme impropres ces locutions 'la communauté commence au jour du mariage;' 'la communauté se composet activement et passivement, &c.' et surtout celle-ci la communauté se dissout. D'ailleurs si la femme n'était pas pendant la communauté co-propriétaire actuelle des biens qui en dépendent, on ne comprendrait pas comment les engagemens qu'elle contracterait seule avec la simple autorisation du mari pourrait lier la communauté, même au cas que la femme y renoncerait."

Our antagonists maintain, that the absolute dominion which the husband has during the marriage over the community property, is utterly inconsistent with the idea of any vested interest in the wife. Let us hear Zachariæ on that point: "*Dire que le mari est seigneur et maître de la communauté, ce n'est pas dire que la femme n'ait jusqu'à la dissolution de la communauté qu'une simple expectative de copropriété. La qualification de seigneur et maître de la communauté n'a, en ce qui concerne la femme, d'autre objet, que de marquer l'étendue des pouvoirs qui appartiennent au mari en vertu du mandat que la loi lui confère comme chef de l'union conjugale.* [Chap. 505, n. 2.] *C'est seulement en ce qui concerne les créanciers du mari et de la femme que cette qualification doit être entendue dans un sens absolu.*"—Zach. § 509, 2 Pi. Lev. 1, tom. 3, p. 437, (n. 1,) ed. Strasb. 1839. Nor is there any thing so novel or incongruous in the idea of present dominion and the power of disposition in one person, while the proprietary interest reposes in another. It is precisely the Roman law with respect to the dowry. "*D'après l'opinion la plus généralement adoptée autrefois par les jurisconsultes, le mari devient vrai propriétaire de la dot si elle lui a été taxée, venditionis causa; dans tout autre cas, la vraie propriété* (*dominium naturale*) *est conservée à la femme, mais cette propriété repose pendant le mariage, et le mari en a l'exercise.*" —Mackeldey, Droit. Rom., p. 268, n. 1 to § 520.

The nature of the wife's interest in the community came up in the case of Dixon and Dixon, 4 La., 191. Porter, J., in delivering the judgment of the court, says: "We are aware the prinples here recognized do not correspond with the doctrines taught by the highest authorities in the French law, by Dumoulin, Pothier and Toullier. They hold that the wife has no right whatever, until the marriage is dissolved, or the community otherwise terminates. That she has nothing but a mere hope or expectancy. Their law on this subject, ancient and modern, and the opinions of their eminent jurists, are collated and examined by Toullier in the 12th volume of his Droit Civil François. A reference to him will show what difficulties attend this question, and how em-

barrassing these jurists find the arguments, which an opposite view of it presents. But it is not for us to deny, or even doubt, the correctness of their conclusions in relation to the law of France. It is sufficient, that it is not the same as ours, and that the difference is marked on this very point. The Napoleon Code does not contain the provision found in the Code of Louisiana, that if the husband alienates during coverture, the *acquests* and gains with the intention of injuring his wife, she may at his decease bring an action to set aside the alienation. The laws of Spain seem to have furnished that doctrine to the jurisconsults who prepared our Code. And the exercise of such a right does appear to us utterly opposed to the principle, that the wife has no interest in the property until the community is dissolved: for if she has not, how can she maintain an action to set aside the alienation? Who ever heard of a suit, the sole basis of which was that the hopes and expectations of the plaintiff had been disappointed and defeated by the acts of the defendant? But admitting that the wife's title to the property did not vest until the community was dissolved, still her right to have an equal portion of such property acquired during coverture, as might be found at its dissolution, existed. It grew out of the marriage; was the law at the time the marriage was entered into, and no subsequent legislation could rightfully take it away. There is an able and learned note of Paillette on the 1437th art. Code Nap., in which this question is incidentally treated, and in which the writer thus expresses himself: *Du moment où le mariage est contracté, la communauté convenue expressément, ou* tacitement *acquiert une existence et une forme irrévocable. Les rapports avec les époux sont à jamais déterminés.*—Toullier, vol. 12. Febrero, p. 1, cap. 1, § 22, No. 240." The correctness of this doctrine has recently been vindicated, even with regard to the French law, by Zachariæ, confessedly its most able modern commentator. Nor can it be contended for a moment, that the Spanish law was different, for we find Judge Derbigny, in delivering the opinion of the court in *Gale* v. *Davis*, a case arising under that law, declaring "The title of the wife to half the *acquests* and gains is that of an *owner*, not that of a mortgagee." The article on which the court holds she has a *property*, is borrowed from the Spanish law.

It is demonstrated, that Alice Packwood's interest in the community property was an actual, vested, legal estate, not a mere expectancy. This interest undoubtedly continued as long as the spouses remained in Louisiana. The next question is—Was it her *separate estate*, in the common law sense of the *term?* This point cannot admit of much doubt. According to the common law, the existence of the wife is merged in that of the husband

during the coverture; they are *one* person in law, and she can have *no separate* property unless it has been secured to her *sole* use by marriage settlement, ante or post-nuptial, or by articles, or agreements in consideration of marriage. Our law, on the contrary, proceeds on precisely the *opposite* assumption, that husband and wife are *distinct* persons, with *different* interests, and *separate* property. Now the wife's interest in the community is by our law so entirely her *separate estate*, that upon *death* or *separation*, she may sue for and recover it. Art. 2404. So entirely *separate*, that if she dies first her heirs succeed to it. So *separate* that she cannot even *give* it to her husband by testament or donation, to the prejudice of her heirs. So *separate*, that even during the *coverture* the husband cannot *alienate* it fraudulently to the prejudice of her rights. So *separate*, that not only she but her *heirs* or *even* her *creditors* may renounce the community after her death, and so acquire the right to recover her effects whether *dotal, extra-dotal, hereditary or proper.* Arts. 2379, 2380. So entirely *separate*, that her *separate* creditors may attack *her* renunciation as made in *fraud* of *their* rights and *accept* the community themselves. Art. 2390. It is impossible to deny therefore, that Alice Packwood's interest in the community was not only a *vested estate*, but also her *separate estate*, in the full common law sense of the term.

Was this *vested separate* estate *divested* by her change of *domicil?* That question has already been incidentally answered in the quotations from Burge, and from the decision of this court in *Dixon* v. *Dixon.* The *change of domicil* must be regarded either as the act of the parties, or the *act of the law.* Now the parties can make no *change* in their marriage settlement: and the law of community of the place where the *acquests* have been made, has been shown to be precisely equivalent to an *actual* written marriage settlement, in which all the provisions of the law of that country were word for word inserted. Regarded as the *act of the parties*, change of domicil can have no effect on the rights acquired by marriage contract. "*Les actes par lesquels les époux ont pendant le mariage modifié leurs conventions matrimoniales sont frappés de nullité.*" Zach. Droit Fr. tom. 3, p. 369, 2 pe. liv. 1, § 503. *Les époux ne peuvent pendant la durée du mariage ou de la communauté transiger sur leurs conventions matrimoniales, &c.* Zach. tom. 3, p. 143, § 440. So also is the common law. "A man cannot grant any thing to his wife, nor she to her husband, nor enter into contract or covenant with him." Story Confl. Laws, 1st ed. p. 124, § 133.

"*La prohibition de modifier les conventions matrimoniales après la célébration du mariage, l'étend aux donations contenus dans le contrat de mariage et s'applique non seulement aux*

changemens que voudraient faire les époux entre eux, mais encore à ceux que ferait l'un des époux avec des tiers qui auraient été parties au contrat. Elle est tellement absolue qu'elle exclut même les modifications qui seraient apportée aux conventions matrimoniales par un acte de dernière volonté, ainsi que les actes par lesquels les parties déclareraient vouloir simplement fixer le sens de quelque clause obscure ou ambigue du contrat de mariage. Zach. Dr. Fr. tom. 3, p. 397; and he adds in a note: "*En effet, la prohibition établie par l'article* 1395, *est fondée d'une part sur la nature même du contrat de mariage, qui intéresse non seulement les époux mais tous ceux qui y ont été parties, ainsi que les enfans à naître du mariage.*" Ib. (n. 12.) Such too is the law of England. *Richards* v. *Chambers*, 10 Ves. Jun. 580, 581. *Seaman* v. *Duill*, ib.

Regarded then as the *act of the parties*, a change of domicil cannot affect the rights vested by the marriage contract. Considered as the *act of the law*, it is equally without effect. If the marriage were dissolved by the sentence of a court of justice, the rights of property of the parties would not be in the least affected. Zach. Dr. Fr. tom. 3, p. 240. Not only the change of domicil, whether regarded as *with* the wife's consent, and therefore *a contract between man and wife*, or *against her* consent, and therefore the *act of the law* which assigns her the same domicil as her husband, cannot affect rights arising under the *marriage contract*. But I go further. If on the arrival of the parties in New York, the Legislature of that state had passed a *private act*, abolishing the community between them as to their *past acquisitions*, such law would be *null*. "*Les droits établis expressement, par un titre irrévocable, fondé soit sur la volonté formelle, de l'homme, soit sur sa volonté presumée restent hors de l'attiente de toute loi postérieure.* Zach. Dr. Fr. tom. 1, p. 53. Introd. § 30. I conclude, therefore, on this point with the language of Burge. "The change of domicil neither divests the parties of any right which they had acquired, nor confers on them any they did not before possess;" and that of this court in *Dixon* v. *Dixon*: "Her rights grew out of the marriage, were the law at the time the marriage was entered into, and no subsequent legislation could rightfully take them away." This court have already decided that the removal of a married couple from one of the common law States, does not alter the rights of property acquired by the marriage. Slaves belonging to the wife while sole, and as personal property *vesting* in the husband by the mere act of marriage, according to the law of the matrimonial domicil, are not *divested* by the *removal* of the spouses to Louisiana. *Perry* v. *Weston et al.* 4 Rob. 107. And why is not the converse of

the proposition true? Why is not the property which belonged to the wife in Louisiana, her's after she removed to New York?

I am now to show that this legal estate of Alice Packwood, vested by contract of marriage, and not *divested* by *change of domicil*, descended to her children and *natural heirs*, as well by the law of *New York* as the law of *Louisiana;* that even if there were a conflict between them, the *comity of nations* does not apply to such a case, and we are bound to follow *our own law* by every dictate of *reason, natural justice and public policy.* And here let me state clearly the difference between our adversaries and ourselves. They insist upon regarding this as a mere question of *inheritance* from a person *dying* in *New York, testate or intestate*, and holding only personal property. We assert, that it is to be regarded as a question of *right* and *contract* under the express provisions of a *marriage settlement* made in Louisiana, and containing word for word all the terms and clauses which, by the law of Louisiana, might rightfully and lawfully be inserted therein in favor of the husband. In order to ascertain what these clauses are, we must inquire what *terms* may lawfully be contained in a contract of marriage made in Louisiana, or more briefly, what clauses *cannot* be allowed; because we concede, that every thing most favorable to the husband shall be regarded as inserted, which the law *admits.* Every thing, in a word, which the law has not *forbidden.* Now, neither "husband or wife can enter into any agreement or make any renunciation, the object of which would be to alter the legal order of descents, either with respect to themselves, in what concerns the inheritance of their children or posterity, or with respect to their children between themselves." Civ. Code, art. 2306. Nor derogate from the rights of surviving husband or wife, or the *prohitory dispositions of this Code.* Art. 2307. Nor make any agreement contrary to *good morals*, Art. 2305; or *public laws.* Art 11.

The civilians divide law into the *Jus Publicum* and *Jus Privatum. Jus Publicum est quod ad statum rei Romanæ spectat.* § 4, J. 1, 1, p. 1, § 2, D. 1, 1. *Jus Privatum est quod ad singulorum utilitatem spectat.* Ib. And thence results the maxim, *Jus Publicum privatorum pactis mutari non potest.* But the question is, to which category do the rights of children as natural heirs, the principles of succession, the distribution of property, majorats, entails, substitutions, and marriage settlements, so far as they affect these objects, belong? Are they *Publici* or *Privati Juris?* Now as it respects substitutions, entails and majorats, most of our State constitutions, regarding equality of property as essential to a republican form of government, have forbidden them. They belong clearly to the *Jus Publicum.* But it is not only in republics that they are so regarded. Zach. Dr.

Fr. tom. 1, p. 23, § 16. As little can it be doubted that on general principles of law, order, and morals, it interests every well regulated state, that children should be well educated, should not be left destitute, and a charge upon the public, &c. Still, the important question recurs, are the laws of *inheritance, succession, marriage, settlement, entail, substitutions, &c.*, in the nature of *public or private laws?* On the one hand we have the legal maxim, "*Cuilibet juri pro se introducto renunciare potest;*" and on the other, "*Renuntiaretur juri ob utilitatem publicam introducto, quod fieri non potest.*" Zachariæ, tom. 3, p. 404, 3 and 5, p. 2, liv. 1, § 504, in considering what agreements spouses may make under the license accorded them by the law, says: "*Ils ne peuvent faire aucune stipulation sur des objets qui ne sont pas susceptibles de former la matière d'une convention quelconque, par exemple, sur une succession non encore ouverte; et il leur est defendu, comme à toutes personnes de passer des conventions contraires à l'ordre public ou aux bonnes mœurs.* Art. 6, 1130, 1133, Code Nap. "*Ainsi ils ne peuvent notamment ni répudier une succession qui doit leur échoir ——— ni changer l'ordre des successions soit par rapport à eux mêmes soit par rapport à leurs enfans entre eux.*" In another place, commenting on nullities, he justly remarks: "*Les nullités sont de droit public, ou de droit privé, suivant qu'elles reposent sur une raison d'ordre public ou sur un motif d'intérêt privé. Cette division est d'une grande importance dans la pratique.*" Tom. 1, p. 69. And in inquiring *what* are those *laws* interesting to *public order* and good morals, which individual contracts cannot derogate from or renounce, he says: 1°. "*Chacun est libre de renoncer et par conséquent, de déroger aux dispositions légales qui ne sont introduites qu'en sa faveur, et qui n'intéressent que lui seul.* 2°. *Nul ne peut déroger aux dispositions de la loi ayant pour objet de garantir les intérêts de tiers.* 3°. *Il n'est pas permis de déroger aux lois qui intéressent* l'ordre public et les bonnes moeurs. *Cette proposition établie par l'article 6, est incontestable en théorie, mais son application donne lieu, dans la pratique, à des sérieuses difficultés. Le legislateur en effet, n'a point déterminé quelles sont les lois qui intéressent* l'ordre public *et* les bonnes moeurs: *il s'en est remis pour la solution de cette question aux traditions de la science, et jusqu' à un certain point, au tact individuel des juris-consultes et des magistrats. On chercherait en vain à résoudre ces difficultés à l'aide d'un principe général. Le seul point constant et universellement reconnu, c'est qu' outre les lois* constitutionelles, administratives *pénales et de police, on doit encore considérer comme intéressant l'ordre public, les règles concernant l'état des personnes, et la capacité de contracter et de disposer par actes entre vifs*

ou testamentaires. Zach. tom. 1, p. 64, Introd. § 46. This is the very doctrine laid down by Judge Bullard in delivering the opinion of this court, in the much controverted case of *Gasquet* v. *Dimitry*, 9 La. 590. "In every well regulated state," says that Judge, "those laws which establish the order of hereditary succession, which regulate the capacity to dispose by last will, and particularly those which define the capacities and incapacities of particular classes of persons, and especially of heirs and married women in reference to contracts, would seem to stand first in rank of those rules involving the great interests of public order, and essential to the welfare of society." Hence the division by Paulus into "*Pacta quæ ad jus et quæ ad voluntatem spectant.*" And hence the familiar maxim consecrated by the wisdom of ages: "*Pacta quæ contra leges, constitutionesque, vel contra bonos mores fiunt, nullam vim habere indubitati juris est.*" In all such cases, *Fortior et potentior est dispositio legis quam hominis.*

The old Civil Code allowed parties to contract by marriage settlement in conformity with the law of any of the states. *Bourcier* v. *Lanusse*, 3 Mart. 584. But this provision is not found in the present Civil Code, and such a contract would now undoubtedly be void. The same case decides, that parties cannot regulate the terms of their marriage contract by reference to a foreign law. If Samuel and Alice Packwood, then, had been married in Louisiana, and had made an express written marriage settlement, stipulating that in the event of their hereafter removing from Louisiana, their acquisitions made while within this state, should be governed by the law of the foreign country to which they should hereafter remove, such agreement would be null. If it would be null as a matter of express compact, can it be good as a mere inference from the change of domicil? Whatever doubt may rest upon the power of the spouses to derogate in their marriage contracts from the laws interesting to *public order* and *good morals*, arising solely from the uncertainty *what laws those are*, there is no question whatever, that every stipulation in a marriage settlement, contrary to the prohibitive provisions of the Code, is absolutely null. Civ. Code, art. 2307. In the first place then, regarding this as a *marriage settlement* made in Louisiana, upon the most favourable terms to the husband, which the law allows:—the contract provided, that if there were no children of the marriage, nor ascendants of the deceased, the survivor should be entitled to the whole of the community property. But if there were children, the wife could leave to the husband by will only the *least child's share* or *part allowed by law.* Civ. Code, art. 1739. Now I apprehend it could not be for a moment

doubtful, that a married woman removing from any state to New York, possessing personal property secured by *such* a written marriage settlement, the property would all, upon her death, descend to her children, unless she exercised her power of appointment by disposition in writing, in the nature of a last will or testament, to the extent that the marriage settlement allowed in favor of her husband, *i. e.* one-tenth in perpetuity, or the usufruct of one-fifth. The whole doctrine, therefore, of an *implied marriage contract* having precisely the same force as an *express written one*, must be surrendered; or, followed up to its consequences, it eads us to the result just stated.

The *separate estate of Alice Packwood*, that is to say, *her interest* in the *community property*, descended to her *natural heirs*, both by the law of Louisiana and the law of New York. The law of New York and the common law States, is the aw of England. *Vide* Toller on Exrs. 224, 225, 226. If any doubt could be raised as to the jurisprudence of New York, it will be solved by a reference to *De Couche* v. *Savatier*, 3 Johns. Ch. R. 190, 211. 2 Kent's Comm. 129, 2 ed. *Methodist Epis. Church* v. *Jaques and others*, 1 Johns. Ch. R 450. *Powell* v. *Murray*, 2 Edw. Ch. R. 643 *Van Duzer* v. *Van Duzer*, 6 Paige, 366. 17 Johns. R. 548, 577. 5 Wheeler, Abr. 563. See Story's Confl. of Laws, § 124, 125, 1 ed. *as to the* general common law doctrine of husband and wife, and Story's Equity from § 614 to 625, for the principles of equity applicable to the subject. Where a married woman has a separate estate, the law, as to that estate, regards her as a feme sole. *Powell* v. *Murray*, 2 Edw. Ch. R. 643. *Van Duzer* v. *Van Duzer*, 6 Paige, 366. A married woman cannot in general make a will in favor of her husband or others. Story's Confl. of Laws, 1 ed. p. 127, § 138. *Fitch* v. *Braynard*, 2 Day's R. 163. But where she has a separate estate, with power of appointment, in writing, by last will and testament, or instrument in the nature of a last will and testament, she may lawfully dispose of her separate property, in that manner, strictly pursuing the powers granted to her by the marriage contract. 2 Story's Equity, 614, § 1388; 517, § 1391; 619, § 1393; 632, § 1395. If that contract secured any interest to her natural heirs upon her demise she cannot derogate from it. 2 Story's Equity, 617, § 1391. *Morgan* v. *Elam*, 4 Yerger, 375. It is not necessary that there should be formal words, or the interposition of a trustee; it is sufficient, if there appear a clear intention to create a separate estate. 3 Johns. Ch. R. 523, 540. 1 Rice's Eq. R. 315. 8 Yerger, 33. 4 Desau. 458. 3 Gill & Johns. 504. Marriage articles are considered as the heads or minutes only of an agreement entered into, between the parties

upon a valuable consideration, (the marriage,) and being in their nature executory, ought to be construed and modified in equity, according to the intention of the parties at the time of concluding them. *Tabb* v. *Archer*, and *Randolph* v. *Randolph*, 3 Hen. & Mun. 399. They cannot be rescinded after marriage, even by consent of husband and wife, but may be enforced in equity at the suit of the issue, whether *in esse* or *en ventre su mere*, or of any other person for whose benefit such articles were intended. Ib. The husband is neither heir of the wife nor next of kin to the wife, and where, in an informal marriage contract, the words "*heir of the wife*" were used, they shall be taken to mean her blood relations. *Tyson* v. *Tyson*, 2 Hawks N. C. 472. And this court recognizes as the law of New York, that a married woman is to be regarded as to her separate estate as a feme sole. *Bonneau* v. *Poydras*, 3 Rob. 16.

If this court refuse to recognize the interest of a wife in the community property acquired in Louisiana, as her *separate property* after the removal of the parties to New York; not only the *disinherison* of the children of the deceased wife follows, but other results still more startling. If the wife's interest in the community is not her *vested separate estate*, and the husband becomes bankrupt, *it passes to his assignee.* If our adversaries are right, therefore this court must decide the present case, precisely as if Packwood had become bankrupt in New York before his wife's death, and in such a case, according to the New York law, Packwood's assignee would recover the whole community property, unless it be her *separate estate*, which our adversaries say it is *not.* This court, then, which will not allow a foreign bankrupt law to take property from an *attaching creditor*, will permit it to strip his children of all their mother's fortune, acquired in Louisiana, *locally here*, and *nominally* under the illusive protection *of its laws!* Such must be the inevitable result of regarding the wife's interest in the community in any other light than as her *vested, separate estate.*

The next inquiry is, did *Alice Packwood* execute her power of appointment, by making any disposition of that *part of her succession*, which, by the terms of her *marriage settlement*, she had a right to dispose of? Did she die *testate or intestate?* Under any other system of law than the common, this matter would not bear a question. "*Testamenta ex institutione hæredis vim accipiunt, et veluti caput et fundamentum totius testamenti intelligitur hæredis institutio.*" § 34. J. 2. 20. Mackeldey, Dr. R. § 632 n. *Testamentum sine hæredis institutio non tenet.* Partid. 6, tom. 1. l. 1. (n. 2.) *Tout testament doit essentiellement contenir l'institution d'un heretier direct.* [*hæredis*

directi institutio.] *Cette institution est tellement necessaire, que si elle venait à manquer entièrement ou à être invalide la disposition de dernière volonté ne pourrait valoir comme testament.* Mackeldey, Dr. Rom. § 650. The forced heirs must be either expressly instituted or formally excluded. Mackeldey, Dr. Rom. § 659, n. 2. A testament without institution of heirs or *exclusion of forced heirs* is *invalid.* Ib. 673. This then clearly according to *our law* is *no testament.* But, say our learned and acute adversaries, this testament was made in New York: it appoints the husband executor: and by the law of *New York* naming him *executor*, is equivalent to making him *heir* of her *personal estate;* her estate by *fiction* of law is all *personal*, and a will valid in *New York*, is valid in *Louisiana* by the 1589th art. of our *Code.* This then we are to understand is a *testament in disguise*, the *institution of an heir* under *color of appointing an executor.* Would the opposite counsel have us believe, that Mrs. Packwood at the time of making this pretended *testament* understood perfectly, she was not merely naming her *husband, executor*, but *appointing* him her *sole heir?* Is it credible that a mother in her last moments, or with the thoughts of death in her mind, should deliberately disinherit her own children, for the purpose of bestowing all her fortune on her husband, and possibly on the children of the woman he was hereafter to marry?

But if, as our adversaries contend, the execution by a married woman in New York of a testamentary paper merely appointing her husband executor is, by force of the law of New York, a will in his favor, how then, does the argument stand? This is *not* a will by our law. But it *is* a will by that of New York, and the *position* of our opponents is, that being a good will of *personal property* in the one State, it is by the *comity of nations* a good will of personal property in all. And they rely on art. 10 of the Code of this State, which declares, "That the effect of acts passed in one country to have effect in another, is regulated by the law of that country where they are to have effect;" and the exception in the next paragraph, which excludes from the operation of this article wills of *moveables* made by foreigners, or citizens of *other States.* The interpretation of this part of the 10th art. which would give to foreigners, or citizens of other States, the right to dispose at discretion, of their moveables *locally here*, by *donations mortis causa*, cannot be reconciled with art. 483, already quoted, which provides, that "Persons who reside out of the State, cannot dispose of the property they possess here in a manner contrary to its laws." If irreconcileable, art. 483, being posterior, repeals so much of art. 10 as is contrary to it. If reconcileable, they are only to be reconciled by

giving them *together* this effect: That the testament made out of the State, according to the forms of a foreign law shall have effect within it, in all matters, and so far forth as it is not contrary to our own fundamental laws and public policy: that is, it is good to pass to Mr. Samuel Packwood whatever his deceased wife, Alice, might bequeath to him by the law of Louisiana—nothing more.

But however this may be, undoubtedly Alice Packwood can only bequeath according to the terms of the tacit marriage settlement: *i. e. that which is hers to give.* She can only dispose by *testament*, therefore, of one-fifth in *usufruct*, or one-tenth *in perpetuity*. Such would be the result, assuming what our learned adversaries assert, that this is a *good testament by the law of New York*. But is this true? For the purposes of this argument, I am willing to consider this testament precisely as if it contained a bequest *in terms* of all her *personal estate* to her *husband*. Would such a testament be *valid* by the law of *New York?* The common law prevails there, except in so far as it is altered by statute. *What is the common law?* It is said in 4 Co. 61, b., that "the law of England will not allow of any custom that a *feme covert* may make a devise, for the presumption that the law has, that it will be made by the *constraint of the husband.*" So Swinburne on Wills, p. 2, c. 9, n. 5: "Though the wife do overlive the husband, yet the testament made during the marriage is not good; the reason is yielded before; because she was intestable at the time of the will making." And Mr. Just. Lawrence, commenting on this doctrine in *Scammell* v. *Wilkinson*, 2 East, 557, shows, that it is law in England to this day. After quoting these authorities he says: "And if this reason be applied to testaments, she can make none, unless it be by consent of the husband and to *his prejudice.*" The question then is, how far has the *common law* been altered by the *State legislation of New York?* This will be answered by reference to the *Revised Code:* "Every male person of the age of 18 years and upwards, and every female *not being a married woman*, of the age of 16 years or upwards of sound mind and memory, *and no other*, may give or bequeath his or her personal estate by *will in writing.*" 2 Revised Stat. of N. Y. p. 4, § 21. "All persons except idiots, persons of unsound mind, *married women*, and infants, may devise their real estate by a last will and testament executed according to the provisions of this title." 2 Rev. Stat. of N. Y. p. 2, § 1. It is clear then, from these *prohibitions*, that a *married woman cannot* by the *law of New York* make a *valid* will *either* of *real* or *personal* estate, except, by virtue of a *marriage settlement securing property to her separate use*, with *power of appointment*, and then only in the *mode* and to the *extent* provided for in *such settlement.* Here, therefore, it would be necessary to concede what our adversaries contest,

namely: 1. That *Mrs. Packwood's interest* in the *community* was her *separate property*. 2. That the *tacit, legal marriage settlement implied* by the *law of community*, as established in *Louisiana, did* confer on her a *power of appointment*, or, in other words, enabled her *to make a will*, which, by the law of *New York*, she is forbidden to do. If so, that power of appointment, thus limited, merely authorizes her to make in New York just such a will as she could have made in Louisiana. And this will, which is utterly *void* by the *law of New York*, can operate *no further*, than *it would* do if made in Louisiana.

If on the other hand, Mrs. Alice Packwood is to be regarded as *dying intestate*, the case presented to the court is that of *a married woman* having *personal property*, secured by *marriage settlement* to her *separate use*, remainder to the *heirs of her body*, with power of appointment as far as one-fifth in usufruct or one-tenth *in perpetuity*, and having died *without appointment*, the whole estate descends to her *natural heirs*, and this is the *law of New York*, as well as the law of *Louisiana*, upon the *case so stated*. But our learned adversaries will not agree that this is a correct statement of the case.

It has throughout been assumed, that whatever might be the *rights of Mrs. Packwood*, had she *survived her husband*, the rights of *her natural heirs*, she having died first, *are not the same*. "*Les héritiers de la femme jouissent sous les divers rapports qui viennent d'être indiqués, des mêmes droits que celle-ci.*" Zach. Dr. Fr., tom. 3, p. 456. "*A la dissolution de la communauté la femme a l'option d'accepter la communauté ou d'y renoncer. Cette option lui appartient même dans le cas où elle a fait prononcer la séparation des biens. Ses héritiers ou successeurs universels en jouissent individuellement chacun dans la proportion de sa partie héréditaire.* Toute convention *qui aurait pour objet de priver la femme ou ses héritiers de ce droit ou qui tendrait à en rendre l'exercise illusoire serait à considérer comme* non avenue.—Ib. tom. 3, p. 486. So that not only the heirs of the wife *do* succeed to all the rights she herself would have had, in case of survivorship, but any stipulation to the contrary inserted in a marriage settlement would be void. The same thing results in Louisiana from arts. 11, 2392, 2305, 2306, and 2307 of the Civil Code, and is recognized as law by numerous decisions. *Robin* v. *Castille*, 7 La. 295. *Broussard* v. *Bernard*, 7 La. 222. *German* v. *Gay*, 9 La. 583. *Hart et al.* v. *Foley*, 1 Rob. 381.

With respect to the alleged right of the *husband as administrator*, to the *choses in action* of the wife, *the answer is twofold*. 1. Mr. Packwood has *not* administered in New York. He has *not* obtained *letters testamentary* in *New York*, and it has

already been shown that, *by the law of that State*, a married woman *cannot make a will.* 2. The *wife's interest in community* property cannot by any means be regarded as a *chose in action*, belonging to the *wife before coverture*, or *accruing to the wife during coverture*, and therefore belonging to the *husband as her administrator.* It is not a *chose in action*, because it cannot be sued for by the wife or by husband and wife during coverture: and the essential definition of a *chose in action* is, a thing which exists in *action only:* a *right of suit;*—a species of property *not in possession*, but susceptible of being *reduced into possession*, by the husband, *during coverture.* 5 Petersdorf, Ab. 404, note. The wife's interest in the community, has not the most remote similitude or analogy to a *chose in action* at the common law. The husband has actual possession, full dominion and power of disposal of the community property during the coverture. He can have no action to reduce into his possession that of which he has possession already. The wife has no right of action for her share of the community during the coverture, except in case of separation. How then can that be a *chose in action*, for which nobody can sue? The interest of the wife in the community resembles rather an absolute estate to take effect after the termination of an usufruct, with this difference, that the usufructuary (the husband) has entire power of disposition and even of waste, provided it is not done wantonly or maliciously—*malo animo.* With respect to the bank stock, *that* is always regarded to have a *locality*, and to be governed by the law of the State where the corporation was chartered and exists. See the late decision of the Supreme Court of the United States in *Zacharie's case*, not yet reported.

It has been urged, that this being a succession of personal property opened in New York, we should be remitted to the foreign forum for the assertion of our rights, if we had any; and we were informed, that if by mere removal the community ceased and the wife became invested with a *separate property*, the Court of Chancery in New York would follow it. To this we answer: That it is not the custom of courts to remit their own citizens to a foreign tribunal, when they have in their own hands the power of doing justice. Thus it has been decided, that "where parties are once in a court whose jurisdiction has attached, they may be required to litigate *all* their *rights there*, relating to the property in controversy, although they reside in another State." *Frost et al.* v. *Bibout*, 14 La. 108; and in *Gravillon* v. *Richards Ex'r.* 13 La. 298; this court determined, that "the power of our tribunals to order the remission of funds belonging to a foreign succession, is a matter of *sound discretion*, and to be exercised according to the comity of nations when no one is injured there-

by." In *Harvey* v. *Richards*, 1 Mason, 409, which turned upon this question, Story, J. said: "The property is here, the parties are here, and the rule of distribution is fixed. What reason then exists why the court should not proceed to decree according to the rights of the parties? Why should it send our own citizens to a foreign tribunal to seek that justice, which it is in its own power to administer without injustice to any other person." The courts of every country assume jurisdiction, in order to do justice to their own citizens, wherever the defendant can be served either by attaching his property within the State, by *distringas*, sequestration, or the publication of a *rule* in chancery. The only exceptions are, where the defendant neither resides within the State, nor has property within the State, and the thing in controversy being also without the State, the court have no means of enforcing its judgment.

But the great argument of our learned antagonist remains to be answered. We advance now, as we did on a former occasion, to sustain the actual property of the wife in the community, the case of *Dixon* v. *Dixon*, in which this passage occurs: "It is not the law in force when the marriage is dissolved, but that in force when it is contracted, that *determines the rights of the parties* under the contract." Granted say they. But in 1804, when these parties removed to Louisiana, the law in force was the *Spanish law*, and by the *Spanish law, the wife could sell or give to her husband*, and by consequence change her domicil with intent to transfer her rights to him. On this Spanish law, the legislation of Louisiana could *have* no effect according to our own doctrine. For in *Dixon* v. *Dixon*, it is said, that "no posterior law can affect the rights vested by the contract;" and in *Saul* v. *His Creditors*, that "the parties must be presumed to contract with reference to the jurisdiction of the law-giver, namely, that they shall be bound by the community while they remain within his jurisdiction, and shall be free from the community when they remove beyond it."

The husband and wife were, by the Spanish law, so far considered separate persons, that they could validly enter into onerous contracts between themselves; but they were prohibited from making donations to each other, during the marriage, of property in possession. The wife, however, could renounce her title to the matrimonial *acquests* or gains at any time before, during, or after the dissolution of the marriage. *L'Abbé's Heirs* v. *Abat*, 2 La. 565. Here, may it please the court, is no *onerous* contract as there was in *L'Abbé* v. *Abat*. Here is neither sale, exchange, nor partition. Here is no renunciation of the wife's rights to the community. Here is no *donation mortis causa*, unless the ap-

pointment of an *executor* is affirmed to be a *testament in disguise*. Where then is the title of the husband, even according to the Spanish law, supposing it unaltered by subsequent legislation? But I am far from admitting it was *unaltered and unalterable*. We must separate the essence of the contract from its incidents and accessories. The one is permanent, inviolable, unchangeable. The others yield to the legislative power which regulates property while it protects it. This is no contradiction, but an affirmation of the doctrine in *Dixon* v. *Dixon* and *Saul* v. *His Creditors*, that the parties must be understood to contract with reference to the law of their domicil, and of course with reference to the right of the law-giver, to *enlarge* or *restrict* the capacities or incapacities of the parties contracting. By far the strongest instances of affecting by *posterior legislation*, personal abilities and disabilities, have been given on this very subject of *marital rights* and the contracts of married women. Thus by the Spanish law, they could renounce their privilege not to be answerable for their husbands' debts, under the law of Toro, corresponding to the *Senatus-consultum Velleianum*. *That has been altered.* They cannot *now* become *bound* for their *husbands' debts* in any way whatever. *On the other hand*, they could *not* renounce their *dotal or paraphernal rights*. This has been allowed by the act of 1835. Are our adversaries prepared to say, that the *power to renounce taken away by one of those* laws, and *given by the other*, applies only to women married subsequent to their enactment? This court have decided the contrary. *Pritchard* v. *The Citizens Bank*, 8 La. 133. And in the same case it was determined, that where there was *no change* of domicil after the period of acquisition, the rights of either spouse in the succession of the other, are to be determined *not* by the law in force at the time of the marriage, but by that existing at the time the succession is opened. 8 La. 133. How impracticable or absurd indeed would be any other rule! These parties came here in 1804; from 1804 to 1808, their *acquests* must have been a trifle. In 1808 the law was altered, and the bulk of their fortune was acquired between 1808 and 1836, the larger part indeed we may infer from the evidence, between 1825 and 1836. But, though the law in force at the time and in the place where the *succession* is *opened*, is the rule where there has been no change of domicil, I have shown it is *not* the rule where *the domicil has been changed*. Burge, 619, 620, 621. Story's Confl. of Laws, 1st ed. 160, 161.

A case like the present, arising under the existing law, is now most equitably provided for. By the act of 1842, (Sess. Acts, p. 300, § 1,) personal property within the State can be disposed of

only in accordance with its laws. The act of 1842, it is true, was passed after Mrs. Packwood's death, but we do not regard it as introductory of any new rule. It is a mere repetition of the *old*, accompanied with more full and extensive directions for carrying it into effect, and improved modes of proceeding in conformity with the *legislative will*, as previously expressed. To sustain this view of the act of 1842, we have only to go back to the 483d art. of the Civil Code, which declares, that "persons out of the State cannot dispose of the *property*, they possess in it, in a manner contrary to its laws." The term *property*, is comprehensive enough to embrace all kinds of things which are susceptible of ownership, and there is nothing in the context or subject matter to restrain it. Therefore, by the English text, persons out of the State can no more dispose of their moveables within the State, *contrary to its laws*, than they can of their immoveables. But if that text admitted of any doubt, the French text might be used to explain it, and the term there used as equivalent to 'property' is *biens:* and *biens* is the most comprehensive term known to the law. Zachariæ says "*l'ensemble de biens d'une personne n'est autre chose à fond que l'utilité collective de tous ses droits civils*," and again "*l'expression* biens *désigne l'utilité qu'une personne peut retirer des objets sur lesquels elle a des droits.*" This court have adjudicated, that the word '*biens*' includes both moveables and immoveables. *Lowry* v. *Kline*, 6 La. 387. "Property comprehends every species of title inchoate or complete. It embraces rights that lie in contract:—executory as well as executed." *Soulard* v. *United States*, 4 Peters, 512.

Lastly, as to the objection that art. 2373, is derived from the Spanish law, and that that law forbade children to sue their parents. The only restriction on children suing their parents by our Code, is in art. 244: "Children cannot sue father or mother for a marriage settlement." Therefore, they *can* sue for *anything else*. See also art. 257, 258. How are articles 243, 250, 256, 257, 258, to be enforced without suit? Cases of suits by children against parents: *Murphy's Heirs* v. *Murphy*, 5 Mart. 83. *Placentia's Heirs* v. *Placentia*, 8 La. 577. *Caldwell* v. *Hennen*, 5 Rob. 20.

Roselius, on the same side.

Bullard, J. A branch of this cause was before us at the last term, (9 Rob. 438,) and the decision then rendered, was confined to the question whether a fund of about $14,000, which had been deposited in the Commercial Bank, was to be considered as belonging to the community, and applicable in the hands of the executor to the payment of the debts.

The present appeal relates to another part of the opposition

made by some of the heirs, to the account rendered by the executor, in which they allege, that the executor ought to account for one undivided half of a plantation and slaves situated in the parish of Plaquemine, and for half the revenues of it during the years 1840, 1841, 1842 and 1843. They allege, that this part of the plantation, not appearing on the inventory, was ostensibly sold, in the year 1840, to David Stewart, for one hundred thousand dollars, on a credit of one, two, three, four, five and six years; but they allege and charge, that the sale was simulated, and that the said Stewart only held the property for Samuel Packwood, with a view of depriving these opponents of their legal rights to said property and its revenues; and they further allege, that Stewart has lately retroceded said property to Packwood, and that said retrocession ought to enure to the benefit of the community, even if it should be decided that the sale was real; that, at all events, the executor is bound to account for the $100,000, for which the property was sold to Stewart.

They further insist in their opposition, that the executor ought to have charged himself with $90,000, for which one-half of the plantation and slaves were sold to T. J. Packwood, which sum, or a greater part of it, the executor has received.

They further say, that the executor has not accounted for 505 shares in the Union Bank, belonging to the community.

They object to the commissions allowed to McBride, for collecting rents.

They allege, that the executor has not deposited, any of the funds which he has received, and for which he is accountable, in an incorporated bank paying interest on deposites, but has applied the funds to his own use, and is therefore bound to pay twenty per cent damages.

These oppositions were sustained, and the executor appealed.

It is proper first to say, that the court did not err in our opinion, in regarding the stock in the Union Bank, secured on real estate, and acquired before the removal of Packwood and his wife from Louisiana, as a part of the community, one-half of which, consequently belongs to the estate of Alice Packwood. Although perhaps moveable, according to art. 466 of the Civil Code, yet it has the same *situs* with the immoveable upon which

it forms a charge; its transfer has to be made on the books of the Bank situated here. But whether it be considered as moveable, or as an incorporeal right, immoveable on account of its relating to real estate, according to art. 462, it belonged to the community *here*, at the death of Alice Packwood.

But we are of opinion, that the commissions paid by the executor, to the person who was employed by him to collect the rents, ought to have been allowed to him, as charged in his account.

Having disposed of the two last grounds of opposition, we come to consider whether the sale to Stewart, by Packwood and his wife, after they removed from Louisiana, was simulated, and, as alleged, with a view of depriving the children of the vendors, of their just rights; and whether such parts of the price of the other half, which had been sold to Theodore J. Packwood before the removal of his parents from Louisiana, received afterwards by Packwood in New York, must be regarded as a community fund in his hands, to be administered here, and for which he is accountable, as a part of the estate of Alice Packwood in this State.

Nearly the whole ground travelled over in argument, when the other branch of the case was before us, has been again explored; but notwithstanding the ability and learning displayed at the bar, the counsel have failed to convince us, that we were in error in adopting, as we did on that occasion, the following propositions, as well founded in law.

1. On the removal of Packwood with his wife, to reside here, in 1804, the law then in force establishing and regulating the matrimonial community of gains, operated upon the property acquired during their residence here, and it became community property.

2. On their change of domicil, in 1836, by returning to reside in a State where a different law prevails, the community law of Louisiana ceased to operate as to future acquisitions of property, whatever may be the effect of such removal as to property previously acquired, during their residence in this State.

3. That the executor *here* administers only on the property in Louisiana, belonging to the testatrix; and whatever estate Mrs.

Packwood may have left in New York is to descend, and to be administered, according to the law of that State.

4. That on the change of domicil in 1836, the title to the property already acquired here, did not vest in the parties each for one undivided half, separately from the other, but the husband, so long as the marriage existed, retained his power over it; that it was subject to his debts contracted after, as well as before the change of domicil, and that he had a right to enjoy the fruits of the property, and to sell it without fraud, and that no distinct separate interest vested in Mrs. Packwood before the dissolution of the marriage by her death; and that, at that period, one-half of whatever property still existed, which had been acquired during the residence of the parties in this State, vested in her heirs, subject to the payment of one-half of the debts contracted during the marriage.

The degree of interest or title, which the wife has in the property acquired during the existence of the community before its dissolution, has been much discussed. It is clear, however, that she has a kind of right susceptible of being defeated by a fraudulent alienation by the husband; a title defeasable by her option not to accept the community, and become liable for one-half of its charges. By the customary law of France, when the husband was guilty of a crime punishable with death and confiscation, the half of the property to which the wife would be entitled on the dissolution of the community, was not confiscated; on the other hand, when the wife was condemned, her contingent share in the community was not forfeited, according to the better opinion of the jurists, and particularly that of D'Aguesseau. Merlin, Rep. *verbo*, Communauté, § 5.

The argument of the counsel for the appellees, that the law of community of the place where the *acquests* have been made, is equivalent to an actual written marriage settlement, in which all the provisions of the law of that country were word for word inserted, and consequently, that the act of the parties changing their domicil can have no effect on the rights acquired by marriage contract, proves too much for his clients; for if that be the case, then the marriage settlement resulting from the laws of Connecticut, the matrimonial domicil of the parties originally, would

continue to operate, as matter of contract, notwithstanding their first change of domicil, and the consequence would be, that the wife would only have her dower in lands acquired here according to the common law. A change of domicil does not appear to us to imply a modification of matrimonial conventions. On the contrary, the law operates upon all persons within the State, and imparts to property acquired by man and wife, while under the operation of those laws, the character of community property according to the definition of the Codes; and the wife acquires in it that species of interest or title of which we have spoken; when they cease to reside here, the law ceases to operate as to their future acquisitions, although a change of domicil does not involve a loss of the inchoate rights of the wife in the property acquired, nor does it, in our opinion, operate to vest in the wife irrevocably her share of the *acquests*, separately from the husband. It is the property found at the dissolution of the marriage, which constitutes the body of *acquests* and gains.

We have said, that the executor, acting under the authority of the Court of Probates, though named as such in a will written in New York, administers only on the estate of Alice Packwood, situated in Louisiana. What estate she may have left elsewhere, and what effect the same will may have as to her property situated elsewhere, it does not concern us to inquire. The principal question with us, is, what constituted the estate of Alice Packwood in Louisiana, at the time of her decease? Our own laws are to determine what constitutes her succession here, and that alone is to be administered by her executor. Her succession may be, as has been contended, an *entire thing;* but that is not inconsistent with the principle that different parts of it, situated in different States, may be administered separately; and nothing can be more manifest than that Packwood, acting here as executor, cannot be compelled to account for anything which the heirs of his wife may allege, formed a part of the estate not situated here.

This brings us to the principal inquiry in the present case, to wit, whether the sale to Stewart of an undivided half of the plantation and slaves in the parish of Plaquemine, was simulated, and made with a view of depriving the children of their legal rights, or, in other words, fraudulent.

One-half of the plantation had been previously sold to their

son, T. J. Packwood, and there is no dispute about the title to that part. When the parties moved to New York, in 1836, they still owned the other half. In 1840, Packwood sold that half to David Stewart, for $100,000, payable in six equal annual instalments, for which notes were given secured by mortgage, to bear interest at seven per cent, if not punctually paid. This deed was signed by Alice Packwood, as well as her husband, at New York; and was duly recorded in the parish of Plaquemine, where the property is situated. Theodore J. Packwood, one of the heirs, afterwards brought a suit against Stewart for a partition of the property. In 1843, Stewart reconveyed the property to Packwood, and the notes were cancelled. It further appears, that in 1834, Packwood had sued Stewart for a part of the price by attachment, and that Theodore J. Packwood was garnished and paid over, after judgment, upwards of $9000 to the plaintiff's attorney.

This part of the case, which relates to the fraudulent character of the sale to Stewart, if it has any legal foundation, is founded on art. 2373 of the Civil Code, which provides, that "if it should be proved that the husband has sold the common estate, or otherwise disposed of the same by fraud, *to injure his wife*, she may have her action against the *heirs of her husband*, in support of her claim in one-half of the estate, on her satisfactorily proving the fraud."

The Spanish law puts the action in such a case, upon the same footing with the revocatory action generally to annul fraudulent contracts; and the sale or other disposition of property made by the husband, must be shown to be made "*dolose ut uxor privetur sua parte*;" or, as our Code expresses it, "by fraud to injure his wife." Gomez ad Leges Tauri. No. 72 and 74.

Although the Code speaks of such an action being given against the *heirs of the husband*, as if it did not contemplate an action against him personally by the heirs of the wife, yet conceding, what is by no means clear, that such an action can be maintained during the lifetime of the husband, by his own children, as heirs of his wife, let us inquire what are the proofs offered in the case before us.

The case does not certainly present the usual *indicia* of fraud.

The wife, with whom the appellant appears to have lived harmoniously, joined in the act and signed the deed. The presumptive heirs of both parties were the same persons—the issue of their marriage. They had lived together nearly forty years. One of the children regarded the sale as *bona fide*, and not wishing to hold the plantation in partnership with Stewart, sued for a partition. Packwood retained a mortgage on the property, and sued for a part of the price, recovered a judgment, and was paid by his son, as a garnishee, the amount claimed. It is difficult to discover in this an intention on the part of Packwood to defraud his wife, who joined him in the sale. The children who make this allegation had, at that time, no interest and no right, which could be affected by the transaction. It was only at the death of Alice Packwood that they acquired any right. Suppose the retrocession had never taken place, and they had sued for the property itself, as in the ordinary revocatory action, could not Stewart have opposed to them the act of Alice Packwood herself, whose heirs they are, and whose contracts they are bound to warrant? It is not enough that the sale to Stewart was merely simulated; it must be shown to have been made to injure the wife, and to deprive her of the share in the common property, to which she would have been otherwise entitled; nor is it enough, that the contract was made with the full consent of Mrs. Packwood, with a view to favor, ultimately, a part of the children to the prejudice of others; if that should be supposed to be the motive of the parties, the children have no right to complain of that as a fraud. Upon the retrocession of the property, the title vested in Packwood alone. If Mrs. Packwood had any interest in the notes which were restored to Stewart, as the consideration for which the sale was cancelled, it is not here that the appellant is to account for it; inasmuch as both parties lived in New York at the time, and the fund does not belong to the community in this State. The retrocession to Packwood took place in July, 1843, several years after the death of his wife, and when they had been both domiciled in New York for many years.

It is further contended, that Packwood is bound to account here, to his children, for the sum of $90,000, the price for which he sold the other half of the plantation to his son during the exis-

tence of the community. It is quite obvious, according to the principles already set forth in this and in the other branch of the case, that the price of that part of the property did not exist here at the death of Alice Packwood, and does not form a part of the community to be settled here: and that the appellant is no more accountable for that transaction, during the lifetime of his wife, than for the price of any other property which he may have sold before the dissolution of the community.

The counsel for the appellees speak of the will of Mrs. Packwood as a disinherison of her children in disguise, as if dictated or suggested by her husband, for his benefit. Of this we have no information; but it should not be forgotten, that real estate situated here to a large amount, appears in the inventory, as belonging to the community, which Packwood had a right to sell at any moment before the death of his wife, but which remains, and one-half is admitted to belong to his children in the right of their mother, of the value of more than $50,000. The share of the wife in that property was not disposed of by her will; and, in fact, the will left whatever property the testatrix may have possessed at her death, in this State, to descend as if she had died intestate.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be reversed; and it is further ordered, that the opposition, so far as it relates to the Union Bank stock, be sustained, and that in all other respects it be overruled and rejected: and that the account rendered by the executor, being thus amended, be approved and homologated; that the opponents pay the costs of the appeal, and that all other costs be paid by the community.

Same Case.—Application for a Re-hearing.

Personal property has no other *situs* than the domicil of the owner.

Roselius, for a re-hearing, contended, that by the cancelling of the sale to Stewart, the property was re-invested in the original vendor, as if no sale had been made. *Power v. Ocean Ins. Co.*

19 La. 30. That at the time of the sale, the property belonged to the community, and by the retrocession again became vested in it. That the dissolution of the community by Mrs. Packwood's death, could not affect the question as to what property belonged to the community; and that its effect was limited to preventing any future acquisitions.

The community of *acquests*, is the creature of the law of Louisiana, and the interest of the wife therein, cannot be divested by her removal from this State. To say, that though the community is dissolved, by the removal of the spouses into another State, as to all future acquisitions, but that it continues to exist as to the property acquired during their residence in this State, and that the husband, as the head of the community, retains the right of selling such property, is fallacious. The community, which commenced from the moment that the parties removed into this State, naturally ceased to exist from the time when their removal from it exempted them from the dominion of the laws of Louisiana. From that period, the legal partnership was dissolved, and the property acquired during its continuance, was held by the spouses in common, subject to the payment of the community debts. The power of a husband to sell the community property, is given to him by the laws of this State, as an incident to the community, and it ceases to exist from the moment that the latter is at an end.

Wilde, in support of the application. The community of *acquests*, and the rights of parties under it, must be considered as springing either from law, or contract. If from the latter, it travels with the parties and follows them to the grave—no law can affect it; if from the former, it must cease to exist, when the parties remove beyond the limits within which it prevails. To declare that the community ceases to exist as to future acquisitions, from the time of the removal of the parties to another State, but that the husband continues to have the power of disposing of the community property, would be to give to the laws of this State not only an extra-territorial, but a partial and imperfect effect.

Bullard, J. Two principal questions have been discussed

by the learned counsel for the appellees, in their petition for a re-hearing.

1. What is the legal effect of the cancelling of the sale, from Samuel Packwood to David Stewart, on the restitution of the notes given for the price of the undivided half of the plantation and slaves, in the parish of Plaquemine?

2. What was the legal effect of the removal of Packwood and wife from Louisiana, with regard to the property acquired during their residence here?

These questions, and the opinion of the court on them, have been discussed so earnestly, that they merit some further notice from us.

I. It is contended, that on the cancelling of the sale to Stewart by Packwood, the property reverted back to Packwood in the same manner as if it never had been sold. But it must not be forgotten that, at that time, Mrs. Packwood had been dead several years; that Packwood no longer represented the community, much less the heirs of his wife, and could not without their consent re-invest in them a title to one-half of the property, which they assert belonged to Mrs. Packwood before her death. Hence they have never pretended that one-half of the plantation belongs to the heirs, in virtue of the cancelling of the sale by Packwood alone. It has never been put on any inventory of the estate, nor required to be so. The heirs have contented themselves with claiming one-half of the amount of the notes originally given by Stewart, and which were returned to him on the cancelling of the sale. Now, admitting for the sake of this argument, that one-half of those notes belonged to Mrs. Packwood as her separate property, and that Packwood, by making use of them for his own benefit, became accountable to her representatives, yet they were at that time domiciled in New York; and it is now well settled, that personal property has no other *situs* than the domicil of the owner. Such a fund, we think, does not form a part of the succession of Alice Packwood, which has been confided to the appellant, to be administered here under the authority of the Court of Probates. If, according to the laws of New York, it was the separate property of the wife, of which we are not informed, it is clearly to be disposed of as a part of her estate, according to

the laws of that State, and not according to those of Louisiana. Let us suppose that those notes, after the death of Mrs. Packwood, had been exchanged for stocks in New York, the domicil of Packwood: will it be contended that he, acting as executor in Louisiana, would be bound to account for them here, where they form no part of her estate? If the same thing had been done in her lifetime, instead of giving up the notes afterwards on the cancelling of the sale, the stocks thus purchased in New York, would clearly not have become a part of the community on the death of Mrs. Packwood. If the fund had been employed in the purchase of other real estate, even in Louisiana, in the lifetime of Mrs. Packwood, it is clear it would not have become community property, after the parties had changed their domicil to New York, and after the law of this State had ceased to operate, so as to create a community; the existing law requiring in order to produce such an effect, in relation to marriages contracted abroad, the residence of both the husband and wife in Louisiana.

There is no doubt, that, in cases of retrocession, properly speaking, the effect is, to re-invest the title as if no alienation had taken place. But that pre-supposes, that the capacities of the contracting parties remain unchanged. Now, according to the pretensions of the heirs of Mrs. Packwood, her right to one-half of the notes, representing the price of the plantation, became on her death irrevocably vested in her heirs; and we repeat that Packwood ceased to represent a community, and the heirs of the wife.

II. Upon the second point, we are by no means satisfied that we erred in relation to the effect which the removal of Packwood and wife from Louisiana, had upon the property acquired here during their residence in Louisiana; and we adhere to the opinion first expressed, that the separate right of the wife to one-half, did not vest, so as to place one-half of the property beyond the control of the husband, by their change of domicil.

Re-hearing refused.

JAMES MITCHELL, Natural Tutor of his Minor Children, *v.* THOMAS JEFFERSON COOLEY.

Where, pending an action instituted by the natural tutor of certain minors to recover an amount due to them, the tutor dies, another tutor must be appointed, in whose name the proceedings may be carried on. The executor of the deceased tutor cannot represent the minors, nor receive, nor administer their property. In such a case, where the tutor dies pending an appeal, the action will be continued until the minors are properly represented, or come of age.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Emerson, for the defendant, moved to dismiss this appeal, for the want of proper parties, the natural tutor by whom the suit was commenced having died, and no other tutor having been since appointed. Civ. Code, arts. 288, 290.

J. and *G. Strawbridge*, for the appellant.

MORPHY, J. This suit was brought by the petitioner, as the natural tutor of his minor children, to recover money alleged to be due to them. There was a judgment of nonsuit below, from which he has appealed. Since the case has been brought up, the plaintiff has died, and John Turpin, his testamentary executor, has made himself a party to the appeal. Its dismissal is now prayed for by the defendant and appellee, on the ground that there is no party in court legally qualified to appear on behalf of the minors, the real plaintiffs in the suit. It is clear, that the executor of the deceased has no quality or capacity to represent the minor children of his testator, or to receive, or administer their property. The sums sought to be recovered, form no part of the estate under his administration, as executor. On the death of their father, these minors should have been provided with another tutor, and he should have been made a party instead of the executor of their late tutor. But while we concur in opinion with the appellee, that the minors are yet unrepresented, we think that his motion to dismiss should not prevail. The appeal was well taken by the former tutor, and the minors should not suffer from the neglect of their relatives or friends, to procure the appointment of another tutor, until they are provided with a legal representative or become of age. The case must stand continued.

It is, therefore, ordered, that the motion to dismiss be overruled, and that the case stand continued to make the proper parties.

Ezra Hiestand *v.* Gideon C. Forsyth.

In a petitory action the plaintiff must make out a valid title in himself, or judgment will be given for the defendant.

Parol evidence is admissible to show that the land in dispute is not included in the conveyance under which plaintiff claims. *Per Curiam:* The fact might have been more properly shown by a survey of the premises, or by a plan annexed to the act of sale; but, in their absence, parol evidence is admissible.

Appeal from the District Court of the First District, *Buchanan*, J.

Simon, J. This is a petitory action. The plaintiff sets up title to a certain tract of land or plantation, together with the improvements thereon erected, situated at the English Turn, parish of Plaquemine, and known by the name of Woodville, being about 17 *arpents* front, on the river Mississippi, by 40 in depth, bounded above by the land of M'Millen and Roselius, and below by the land of Arneaux Lanneau, which plantation is his property, with the exception of six lots, each measuring 90 feet front, on the public road, by 180 feet in depth, and is the same which formerly belonged to the defendant, who, having become insolvent, surrendered it to his creditors, for whose benefit it was sold by their syndic, and adjudicated to Charles Patterson, through whom, by a regular chain of conveyances, the petitioner holds and owns the same.

He further states in his petition, that the defendant, pretending to have a claim to a part of the said plantation, has taken possession of a house and lot of ground situated thereon, which lot contains about three acres of ground, measuring about 150 feet front, on the public road, by about 250 deep, and situated between the petitioner's house and the Woodville Coffee House, and to which said defendant sets up title as being his property. The petitioner prays, that his title to the property may be recognized;

that a writ of possession issue; and that the defendant be condemned to pay him $1500 for rents and profits, &c.

The defendant in his answer pleads the general issue, except that he admits, that he is in possession of the lot described in the petition, and has been so for many years. He further denies, that the plaintiff has any title to said lot, and avers, that the same was formerly mortgaged to Madame Tremoulet for the sum of $500, &c.

Judgment was rendered below in favor of the plaintiff, for the lot of ground on which the defendant resides, together with the improvements, being the same lot described in the conveyance from the widow Tremoulet to the defendant, and allowing said plaintiff twelve dollars per month for rents and profits, from the date of judicial demand. After a vain attempt to obtain a new trial, the defendant has appealed.

The appellee has prayed in his answer, that the judgment appealed from be so amended, as to allow him to recover the whole tract of land claimed in his petition, with all the improvements thereon, &c.

It is a fixed and well settled principle of law, that *in a petitory action, the plaintiff must make out his own title, and that otherwise, the possessor, whoever he may be, shall be discharged from the demand;* (Code of Pract. art. 44. Civ. Code, art. 3417;)—and this court has often held, that in such an action, the defendant is not bound to show title, until the plaintiff has shown his; (8 Mart. N. S. 105;)—that even a plea of the defendant, that he has a better title to the property claimed, will not impair the force and effect of the general issue; (10 Mart. 293;)—that the plaintiff is bound to produce a title, as owner, *causa idonea ad transferendum dominium*, to repel the presumption of ownership, resulting from mere possession in his adversary; (8 La. 246;)—that such plaintiff can only recover *on showing a valid title to the disputed premises in himself;* and that on his failure to do so, judgment must be for the defendant. 10 La. 351. 13 Ib. 555.

Now, what title has the plaintiff shown to the property in dispute, which he alleges in his petition to be in the possession of

the defendant, and which the latter admits in his answer, that he has possessed for many years?

It appears, that in 1833, the defendant having become insolvent, made a cession of his property to his creditors, and that, among other articles surrendered for the payment of his debts, he abandoned "*a sugar plantation, situated at the English Turn, having* 24 *to* 25 arpents *front, on the river Mississippi, &c.*" A short time afterwards, the property ceded was sold by the syndic of his creditors, and Charles Patterson became the purchaser of the insolvent's plantation, with all the buildings, &c. thereon, described in the deed as *measuring seventeen and three quarter* arpents *front*, on the river, and running back to the depth of forty *arpents*, at which depth it has a breadth of six *arpents*, bounded below by land of A. Lanneau, and above by a tract of Pierre Lacoste; and sold and fully guarantied, *with the exception of twelve lots measuring each ninety feet front, on the river, by* 180 *feet in depth*, as laid out on a plan of Woodville, which twelve lots are included in said tract, *six of which are included in the sale*, and are sold without any warranty whatever; *the other six are claimed by other individuals, and are not included in the sale.* The tract contains 400 superficial *arpents*, more or less, as per a plan drawn by Bringier, which was exhibited on the day of the sale, and is annexed in the margin thereof for reference.

In August, 1833, Charles Patterson sold the above described plantation to Maurice Cannon, according to the description given in the first deed, as containing 400 superficial *arpents*, more or less, "with the exception of twelve lots measuring each 90 feet in front, on the river, by 180 feet in depth, as laid out on the plan of Woodville, *which said lots are hereby reserved.*" Thus, M. Cannon acquired none of the twelve lots, six of which remained the property of Charles Patterson, the original purchaser, so far only as his purchase might extend.

In March, 1836, M. Cannon sold the same property to George Beauregard, with the same description, with the exception of the twelve lots originally reserved.

In February, 1837, Beauregard sold the plantation to D. M'-

Millen again, with the exception of the twelve lots "not hereby conveyed."

In April, 1838, M'Millen sold the place to Rondeau, with the exception of a portion of land measuring two *arpents* front, on the river, adjoining the property of C. Lacoste, which portion had been previously conveyed by the vendor to C. M'Millen and C. Roselius, and also with the exception of the twelve lots reserved by the previous vendors.

In September, 1838, Rondeau sold back the property to D. M'Millen, with the same description and exceptions.

In April, 1840, M'Millen sold the plantation to George Beauregard, with the same description and exceptions; and on the 29th of January, 1841, Beauregard having sold to N. C. Lane five *arpents* in front, of the whole tract, by twenty *arpents* in depth, as being a part of the plantation by him acquired from M'Millen, he, Beauregard, conveyed the balance on the same day to Warren Stone, with the same description and exceptions.

In August, 1841, Lane acquired from Charles Patterson the latter's right, title, interest, and claim of every kind or nature whatsoever, which he had, or may hereafter appear to have, in and to any of the lots of the town of Woodville, as included in the adjudication made to him by the syndic of Forsyth's creditors.

In October, 1842, Lane sold to plaintiff the five *arpents* in front by twenty in depth, which he had acquired from Beauregard, and his right and title to the lots transferred to him by Patterson; and, in December following, Stone sold to plaintiff the balance of the plantation by him purchased from Beauregard, with the same description and exceptions.

Thus, it appears, that under the different conveyances first originating from Patterson, the plaintiff has acquired, and has shown himself vested with a title, which is the same title to the same property, (except the portion sold to M'Millen and Roselius,) which was conveyed to Patterson by the syndic of the defendant's creditors, to wit: a plantation of seventeen *arpents* and $\frac{3}{4}$ of an *arpent* front, on the river, and fully guarantied, ***with the exception of twelve lots***, measuring each 90 feet by 180, as laid out on the plan of Woodville, ***six of which lots are included in***

the sale, and *the six other lots are not included in said sale, and are claimed by other individuals.* Hence, the question occurs, is the property claimed in this suit included within the limits of the six lots sold with the plantation; or does it make a part of the six lots which were not sold? For if it is embraced or consists in one or more of the latter, it is clear the plaintiff has no title to it, and cannot recover.

The plan of the town of Woodville, alluded to in the deed from the syndic to Patterson, as being annexed thereto, and also mentioned in all the subsequent deeds, appears to have been lost or mislaid. It was not produced in evidence, and some of the witnesses say, that it is lost; but there is no evidence of any diligent search having been made for it. It may yet exist, and we consider it so material, that it would be difficult, if not impossible, to come to any final decision on the rights of the parties, unless the original, or a copy thereof, be procured, or some other legal means be resorted to, to ascertain the exact situation and location, in the town of Woodville, of the property in controversy.

The evidence shows further, that a survey of the town of Woodville was also drawn out by one of the witnesses, who, in his testimony, proceeds to give a description of the twelve lots on which the town is located, and of their extent; but the plat of survey was not produced, and as the proof of the location of the premises in dispute, within the limits of the six lots which were sold, or of the six ones which were not sold, is very uncertain and unsatisfactory; and as, although the plaintiff has made out a title to six of the lots, he has not satisfied us that the property claimed in this suit is within the boundaries of his purchase, we think justice requires, that this case should be remanded, for the purpose of ascertaining the exact location of the premises in dispute, either by a survey thereof, or by the production of the surveys heretofore made, and alluded to in the parol and written evidence, or by such other legal means and proof as the parties may think necessary to resort to upon this important part of their case. As it stands, we could not give any satisfactory answer to this material question of fact, upon which the case will perhaps ultimately turn.

With this view of the actual state of the case, it is unnecessary

for us to inquire into the title set up by the defendant, for, if it is not shown by the plaintiff that his title covers the premises in dispute, this alone will be sufficient to put an end to the controversy, and to reject his pretensions. Until then, the defendant, whose admission in his answer, that *he is in possession of the lot described in the petition*, cannot be construed as admitting that said lot is included within the limits of the property described in the plaintiff's title deeds, has nothing to show; as, according to the principles above recognized, it is the plaintiff's duty to make out his title *to the land in contest*.

With regard to the objections made by the plaintiff to the testimony of D. Saucier, Lanneau, and Cammack, admitted by the court, *a qua*, to prove facts going to identify the property in dispute, and to show its location, we think they were properly overruled. The evidence does not appear to be intended to show title by parol, but only to establish, that the land sued for does not form a part of the property conveyed by the syndic to Patterson, and is not included within its limits. This would have been more properly shown by a survey of the premises, and particularly by the plan annexed to the sale; but, in its absence, we cannot say that the proof was inadmissible.

It is, therefore, ordered and decreed, that the judgment of the District Court be avoided and reversed, and that this case be remanded to the lower court for a new trial, for the purposes expressed in this opinion; the appellee paying the costs of this appeal.

Hiestand, pro se.

Rawle, for the appellant.

PIERRE H. KERNION and others *v.* HORATIO W. HILLS and another.

The amount of a judgment rendered by a court of the first instance, cannot be pleaded in compensation in another action, where an appeal taken from the judgment is yet undetermined.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Chinn and *Canon*, for the plaintiffs.

G. Strawbridge, for the appellants.

MARTIN, J. This suit is brought on an account of the plaintiffs as inspectors of tobacco. They sought to probe the conscience of the defendants by the following interrogatories, viz: 1st. Are you not indebted to the plaintiffs in the sum of thirty-three hundred, thirty-seven dollars, twenty cents? If not, in what sum are you indebted to them? 2d. Is not the annexed account just and true? If not, in what is it unjust or false?

The answer denies any claim of the plaintiffs, and a judgment against them, in the Court of the First District, is pleaded in compensation. In answer to the interrogatories, the defendants say, that they are not indebted to the plaintiffs in any sum whatever. They admit, that the account sued upon is correct, with the exception of the last item, which was added since; they being unable to say, whether it is correct or not, as no marks or numbers are given. They add, that one of the plaintiffs had agreed with them, that the account should remain unclaimed, until the final decision of the suits by the present defendants against the plaintiffs in the District Court; but that, since the institution of the present suit, another of the plaintiffs stated, that the plaintiffs had withdrawn from their agreement to set off, because advised by their lawyer that it was an admission of the validity of the judgment.

The plaintiffs had judgment, and the defendants appealed. The latter admitted the correctness of the account, except as to the last item of $105, for the inspection of 173 hogsheads of tobacco. The plaintiffs propounded a supplemental interrogatory, the answer to which admits that item, for $97 20, for the inspection of 162 hogsheads. The First Judge rejected the claim for the difference, to wit: the inspection of thirteen hogsheads, or $7 80. The compensation was properly disallowed; as the judgment offered to be set off was appealed from, and not yet acted upon in this court. Besides, the agreement to compensate was not proved, it being only shown that it was agreed, that the plaintiff's claim should remain suspended until the final decision of said judgment.

Judgment affirmed.

The New Orleans Gas Light and Banking Company v. Cornelius Paulding.

The act of 1 April, 1835, incorporating the New Orleans Gas Light and Banking Company, having conceded to the company the exclusive privilege of vending gas in the cities of New Orleans and Lafayette (§ 36,) during a certain period, the company is bound to supply gas to all persons who may call for it, on their paying or offering to pay therefor. The company have no right to require the owner of a building to pay an amount due by a former owner for gas, as the condition of supplying him.

A promise by the owner of a building to pay an amount due by a former owner for gas, made in order to obtain gas for his own use, and in consequence of a threat, by the company having the exclusive privilege of vending gas, that unless the amount were paid, no gas should be supplied, is void. C. C. 1853.

A debt due by a third person is a sufficient consideration for a promise to pay; but the promise must be unequivocally and freely made, and made to the creditor. C. C. 3004, 3008.

Appeal from the District Court of the First District, *Buchanan*, J.

G. Strawbridge, for the appellants, cited the Civil Code, arts. 1850, 1884, 1896, 3007. *Flood* v. *Thomas*, 5 Mart. N. S. 560.

Preston, for the defendant.

Morphy, J. The petitioners seek to recover of the defendant $849 34, on a bill for gas furnished to the Planters' Hotel in Canal Street up to the first of November, 1840, on the allegation that he is bound for, and has assumed to pay this amount. The defendant admits that he is indebted to the plaintiffs in a sum of about $100. He says that he can fix no precise amount, because they have refused to make out a bill for the gas he applied for, although requested so to do; that he has always been ready and willing to pay said sum, but denies owing them any other amount. The defendant further specially denies, that he ever assumed to pay the plaintiffs' claim as set forth in their account; he avers that if he ever uttered any words, which might be construed into an assumption to pay said claim, it was through an error created by the plaintiffs themselves, who insisted that he was liable for the debt, and who unjustly and oppressively refused to furnish gas to his hotel unless their claim was settled. There was

a judgment below for $100 only, from which the plaintiffs appealed.

The bill annexed to the petition, debits the Planters' Hotel for the whole amount claimed, without stating either the space of time during which the gas was furnished, or the names of the persons who applied for, or used it; but from the evidence it appears, that the Planters' Hotel was sold by the defendant to one Armstrong, in December, 1836; that the latter had the gas fixtures put up, and light furnished to the house; that, in May, 1839, Samuel N. Hite purchased the establishment, and kept it until December following, when he leased it to one Oliphant, by whom it was kept four or five months; after which it was repurchased by the defendant, in 1840, at a sale made by the syndic of Hite's creditors; that almost all the gas for which payment is now demanded of the defendant, was applied for and consumed by his predecessors, in whose business he is not shown to have been concerned; and it is not pretended, that before he resumed possession of the property, he was ever asked or called upon to pay the money due to the company. John M. Lee testifies, that while he was sick at the hotel, in January, 1840, he heard in his bed-room, a conversation between Hite and the defendant, in which both agreed, that the gas should be paid for, to prevent it from being stopped; that this was said at a time when Wells, the secretary of the company, had become pressing for the amount of their bill; he thinks that Oliphant was present. Allen, an officer of the company, says, that he several times applied for payment at the hotel; that his last application was to Ruddock, who was in charge of it for Oliphant; that he told Ruddock he was directed to stop the gas until the bill was paid; that Ruddock answered that the hotel had been taken out of his hands on that morning, and that Paulding was to carry it on; that he would speak to the latter, who was standing by, and he accordingly informed him of what witness had said; that Paulding requested that the gas should not be cut off, and said he would call the next day and settle with Wells; that Allen had an order to cut off the gas, and a black boy in attendance to carry it into effect. After this conversation, which took place in May, 1840, the gas continued to be furnished until about the

time the hotel was closed. Paulding called at the gas office and asked for his bill; but, upon that made out against the Planters' Hotel being presented to him, he denied having assumed to pay it; and said, he was ready to pay for the gas he himself had used, and would pay for nobody else. This testimony is, perhaps, too loose, to prove a positive engagement on the part of the defendant to pay a large amount of money, for which he was clearly not responsible to the company; but even were it considered as sufficient, the consent he gave, under the circumstances disclosed by the record, is not such a one as should bind him. The company, which had neglected to collect monthly their bills for gas, according to their own regulations, and had suffered them to accumulate to a large amount, had no right to impose upon the defendant the condition of paying these arrearages, due by the insolvent, in order to obtain gas for his hotel. Having the sole and exclusive privilege of vending gas lights in the cities of New Orleans and Lafayette, they are, we apprehend, bound under their charter, to supply gas to all persons who call for it, on their paying, or offering to pay for the same. Act of 1833, p. 33, § 1. Act of 1835, p. 107, § 36. The announcement that, unless the bill was paid, the gas would be cut off from his large hotel, which must have occasioned the defendant a very serious injury in his business, was an unjust and illegal requirement; it was a threat, under the influence of which the promise relied on was clearly made, to avoid the immediate injury he would have sustained, had it been carried into effect. Such a promise is void for want of consent, and a legal consideration. Civ. Code, arts. 1844, 1845, 1887. "Where there is no other cause for the contract," says article 1853, "any threats, even of slight injury, will invalidate it." In the present case it is difficult to conceive a motive for the defendant's promise, other than the fear of injury created by the threats of the company's agent. As relates to the conversation mentioned by Lee, it took place out of the presence of the plaintiffs, or of any of their agents. The defendant said, that the gas previously furnished should be paid for; but came under no promise or obligation to them to pay for it himself. It is true, as was held in *Flood* v. *Thomas*, (5 Mart. N. S. 560,) that a debt due by another is a sufficient consideration upon which to base a promise

to pay; but such promise, in order to be binding, must be positive and freely made. The intention of becoming surety for the debtor must be unequivocally expressed, and the contract must be made with the creditor. Civ. Code, arts. 3004, 3008.

*Judgment affirmed.**

L. CONSTANT VAUQUELIN *v.* CHARLES PLATET and another.

Defendants sued by the transferree of a note made by them, but not negotiable, pleaded their discharge under the insolvent laws. The schedule of the insolvents showed that the payee of the note was placed on it as a creditor for a sum exceeding the amount of the note. It was not proved that the note had been transferred to plaintiff, nor that defendants were notified of the transfer previously to filing their *bilan*. *Held*, that it was for the plaintiff to show that the amount for which the payee was placed on the *bilan* as a creditor did not include the note sued on; and there being no allegation that defendants have acquired any property since their discharge, that there must be a judgment of nonsuit.

A creditor, whose claim has not been placed on the schedule of an insolvent, is not affected by the proceedings.

APPEAL from the City Court of New Orleans, *Collins*, J.

SIMON, J. The plaintiff seeks to recover the amount of a note and account annexed to his petition, which form together a sum of three hundred and eight dollars and fifty cents. The note sued on, made payable to one J. Lavarenne, for two hundred and fifty dollars, is dated the 1st of May, 1839, and is not in a negotiable form; and the account is for nine cords of wood, stated to have been furnished by the plaintiff to the defendants, at the rate of six dollars and a half per cord, is dated on the 2d of June, 1839.

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* *G. Strawbridge*, for a re-hearing, cited as to the proof of Paulding's promise by the evidence of Lee, *Amory* v. *Boyd*, 5 Mart. 414. *Lo're* v. *Poyntz*, 5 Ib. N. S. 443. As to the effect of the promise, *Mayor* v. *Bailly*, 5 Mart. 322. *Marigny* v. *Remy*, 3 Mart. N. S. 607. *Flower* v. *Lane*, 6 Mart. N. S. 152. *Pemberton* v. *Zachary*, 5 La. 316. Civil Code, art. 1884. As to how far suretyship must be expressed, *Cooley* v. *Lawrence*, 4 Mart. 639. *Guidry* v. *Vives*, 3 Mart. N. S. 660. *Shelmerdine* v. *Duffy*, 4 Mart. N. S. 38. *Lawrence* v. *Oakey*, 14 La. 387.

Re-hearing refused.

The defendants pleaded, that the note sued on was made in favor of J. Lavarenne, who transferred it to the plaintiff. That they, said defendants, took the benefit of the insolvent laws, in April, 1840, and that both the note and account were placed on their schedule, &c.

A judgment of nonsuit was rendered below against the plaintiff, on the ground of the defendants' having fully made out their defence, from which the plaintiff has appealed.

The only evidence which accompanies the record, is a transcript of the proceedings had in the suit of *Platet Frères* v. *Their Creditors*, in which we find that Jean Lavarenne, of New Orleans, was placed upon the insolvents' schedule, for the sum of $526 75, as due him by the insolvents. Now, nothing shows that the note sued on was transferred to the plaintiff by Lavarenne, previous to the filing of the defendants' *bilan*, nor that any notice of the transfer thereof (it not being a negotiable instrument) was ever given to the latter before their declared insolvency; and we may fairly presume, that Lavarenne was placed upon the said *bilan*, for the whole amount which was then due him by the insolvents, including therein the amount of the note sued on. If it was not, it was the duty of the plaintiff to establish the fact, that the amount mentioned in the *bilan* was a different debt from that sued on.

The insolvents were regularly allowed the benefit of the insolvent laws, by a judgment rendered contradictorily with their creditors; and there being no allegation in the petition that they have acquired any new property since their discharge, we think the Judge, *a quo*, did not err in nonsuiting the plaintiff as to the note of $250. 7 Mart. N. S. 565. With regard, however, to the account of $58 50, claimed by the plaintiff in his own right, and as due him previous to the surrender, the evidence shows that this was not placed on the insolvent's schedule, and it is clear, therefore, that said plaintiff cannot be affected by the insolvent proceedings. 18 La. 464. The amount of said account seems to be admitted by the defendants' answer, which does not even plead the general issue; and we cannot see any valid reason, why the plaintiff should not be entitled to a judgment in his favor for the amount.

It is, therefore, ordered and decreed, that the judgment appealed from, so far as it nonsuits the plaintiff, and rejects his claim on the note sued on, be affirmed; that it be avoided with respect to the account; and that said plaintiff recover of the defendants jointly, the sum of fifty-eight dollars and fifty cents, with legal interest from judicial demand until paid, with costs in both courts.

Cyrot Gentes, for the appellant.

Latour, for the defendants.

William Turner *v.* James Walsh and another.

The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the district court of the domicil of the accused; and there must be a trial by jury. Acts 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1.

Appeal from the District Court of the First District, *Buchanan*, J.

Simon, J. This is an appeal from a judgment discharging a rule taken by the plaintiff, for the use of one John H. Tate, on Alfred M'Carty, Esq., an attorney and counsellor at law, to show cause, within ten days from the service of the said rule, why he, M'Carty, should not be condemned to pay to Tate the sum of $707 50, with interest, it being the amount collected by M'Carty, as attorney at law, for the plaintiff in this suit; and why said M'Carty's name should not be erased from the list of attorneys, and his license to practice law in the State of Louisiana cancelled, for having refused to pay the said sum to the real owner thereof, when demanded of him, &c.

It appears, that on the 4th of May, 1839, two notes were placed by Tate in the hands of the plaintiff, Turner, for the purpose of being collected by the latter, and of being paid over, if collected, to the order of said Tate, or the notes returned on presentation of the receipt. The note sued on was one of them, and had been put into the hands of M'Carty (who gave a receipt accordingly)

by Turner for collection, on the 16th of July following. This suit was instituted in February, 1840, and judgment obtained against the defendants for the amount of the note, to wit, seven hundred dollars, with interest, costs of protest, &c. The petition is signed by James Mitchell, as attorney for the petitioner; but the statement of facts made by the Judge, *a quo*, shows, that it was admitted on the trial of the rule, by M'Carty, that he had been employed in his professional capacity by Turner, and that he had collected the amount of the judgment rendered herein, &c.

The object of the rule is twofold: 1st. The plaintiff, for the use of his principal, seeks to obtain a judgment against his attorney at law, M'Carty, for the amount collected by the latter, on the judgment rendered herein, which his said attorney admits to have collected and received. 2d. He further prays, that M'Carty's name may be erased from the list of attorneys, and his license to practice law in this State cancelled, for having refused to pay the sum collected, when demanded of him.

1. We are unable to see any reason why this branch of the plaintiff's demands, should not be allowed. No exception has been taken by the defendant to the mode of proceeding. He joined issue on the merits of the claim set up against him, by alleging that he had never been employed as counsel for the actor in this suit, and that he had not received any money for him. The evidence shows that the note sued on was placed in his hands for collection, that he gave a receipt therefor, that he was employed in his professional capacity, and that he collected the amount of the judgment; and we think the plaintiff, who acts here as agent of the true owner of the money received by the attorney, is entitled, for the use of his principal, to a judgment against the defendant in the rule, for the whole amount collected by the latter.

II. On the second branch, this case can hardly be distinguished from that of *Chevalon* v. *Schmidt*, (11 Rob. 91,) in which we discharged a similar rule, taken to compel the payment of the balance of a judgment already obtained against the attorney. We said, that satisfaction of the judgment could be sought by means of a writ of *fi. fa.*; but that an attorney's license cannot be withdrawn unless on conviction in the manner pointed out by the 3d

section of the act of 1823, (B. & C.'s Digest, 23,) that, under the provisions of that act, and of the 6th section of the act of 1808, and the 1st section of the act of 1826, (B. & C.'s Digest, 22, 24,) there must be a proceeding by information before a court of competent jurisdiction, and a trial by jury; and that the term *conviction*, used in the statutes, does not mean a judgment in a civil case. We are satisfied with our former decision in the case above quoted, and must come to the same result on this branch of the rule under consideration.

It is, therefore, ordered and decreed, that the judgment appealed from, so far as it discharges the first branch of the rule taken by the appellant, be annulled and reversed; and it is ordered and decreed, that said plaintiff and appellant, do recover of the defendant and appellee, the sum of seven hundred and seven dollars and fifty cents, with legal interest, *per annum*, on seven hundred dollars, from the 3d of July, 1839, until paid; and with regard to the second branch of said rule, it is further ordered and decreed, that the judgment of the District Court discharging it, be affirmed, and that said appellee pay the costs in both courts.

Fraser, for the appellant.

Roselius, for the appellee, M'Carty.

ARMAND MERCIER and another v. JEAN FRANÇOIS CANONGE, Tutor, and others.

Real property inherited by one of the spouses during the marriage, and existing in kind at the time of its dissolution, should not be included in the settlement of the community between the survivor and the heirs of the deceased spouse; it must be withdrawn by the owner in the condition in which it existed at the dissolution of the marriage. If built upon, or improved during the marriage, the owner of the soil has a right to keep the improvements on accounting to the other spouse for one-half of the enhanced value of the property. C. C. 2377. He has no right to abandon the soil to the other spouse, nor to the community, and to claim in its place the amount of a previous valuation of it, thereby prejudicing the rights of others.

Where a slave, inherited by minors from the succession of their mother, has been illegally sold by their natural tutor, they will not be allowed to ratify the sale,

and claim the price from their tutor to the prejudice of other creditors of the latter. Their recourse is against the purchaser for the recovery of the slave.

Where, after the dissolution of the community, the surviving spouse borrows a sum on the pledge of bank stock belonging to it, he should be charged in the settlement of the community, only with the sum borrowed, and not with the whole amount of the stock, which continues the property of the community.

Where, after the death of the wife, the surviving husband, being the natural tutor of their minor children, transfers stock in an insurance company, which belonged to the community of *acquests*, in payment of his individual debts, at a rate greatly exceeding its real value, he should not, where third persons are interested, be charged in the settlement of the community with the amount for which the stock was taken in payment, but with its real value at the time of the transfer, unless it be shown that the stock afterwards increased in value; and the burden of proving such increase is on the heirs of the wife. *Per Curiam:* The tutor is only bound to return to the minor the estimated value of those moveables which he cannot restore in kind. C. C. 333.

In the settlement of the community, dividends on stock belonging to it received by the surviving spouse after its dissolution, must be placed to its credit; and it must be debited with the amount of any interest on its debts paid by the survivor.

Defendant, the natural tutor of his minor children, having rendered an account of his administration of the estate of his deceased wife, with whom there existed a community of *acquests*, charged himself with the revenues of the minors derived from property inherited from their mother and administered by him as tutor, but omitted to credit himself with the expenditures incurred subsequently to the dissolution of the community for their maintenance and education. It was proved, that the community and the surviving husband were insolvent, and that the latter had no property at the death of the wife. The property of the minors was sufficient to provide for their support and education. On an opposition by plaintiffs, who had obtained a judgment against defendant, their former tutor, for a balance due to them: *Held*, that defendant, as natural tutor of his children, was bound to account for the revenues of their property, after deducting the expenses of their support and education, according to their means and condition in life; that the alimony due from ascendants to descendants being due only in proportion to the wants of the one and the circumstances of the other, none was due by defendant to his children, (C. C. 245, 246, 247); and that the children having an income sufficient for their support and education, plaintiffs, who were interested in the settlement of the tutorship, had a right to require that the support and education of the minors should be paid for out of the revenues of their property.

APPEAL from the Court of Probates of New Orleans, *Bermudez*, J.

SIMON, J. The plaintiffs in this action, having previously obtained a judgment against Jean François Canonge, their former tutor, homologating the account of tutorship by him rendered,

and liquidating the amount due to them respectively, have instituted these proceedings with a view of procuring the final settlement and liquidation of the estate of Amélie Mercier, deceased, wife of their said tutor, and of the community heretofore existing between them; which settlement and liquidation, to be had between J. F. Canonge and the heirs of his deceased wife, is represented as necessary for the protection of the petitioners' rights and claims, under the judgment rendered in their favor, which, they allege, could not be satisfied out of any of the property belonging exclusively to the defendant, J. F. Canonge.

The defendant, J. F. Canonge, joined issue by stating his readiness and willingness to render an account of his administration of the succession of his late wife, which he administered as the natural tutor of his children, who, he says, are all of age, with the exception of one, and have accepted the said succession, purely and simply. And, after an intervention on the part of the said children, praying that a tutor *ad hoc*, might be appointed to their minor brother; that their co-heirs, children of the first marriage of their mother with Amelung, might be made parties to the proceedings; that an inventory and appraisement of all the property held in common between the parties, be ordered to be made; and that their father be ordered to render an account of all the moneys and property of every description, whatever, received or retained by him, for the petitioners and their co-heirs, and of his administration of said property and funds; and that a final partition in kind, be decreed and made of all the common property, as well as of the moneys, for which their said father may be liable or responsible towards them, &c., it was agreed by the counsel of all the parties, that the Judge of Probates should be requested to render a provisional decree, whereby the defendant, J. F. Canonge, should be directed to furnish said account within ten days. This decree was rendered accordingly; and in compliance with it, the defendant, J. F. Canonge, produced and filed a long and detailed account of his administration, and of the situation of the affairs and property of the said succession and community, which was submitted for homologation to the Court of Probates.

The plaintiffs, being creditors of Jean François Canonge, in the sum of $26,731 35, by virtue of the judgment above mentioned

and having by law, a lien and mortgage on all the immoveable property of their former tutor, and being, therefore, interested in the proceedings had between the heirs of Amélie Mercier, and her surviving husband, obtained leave to intervene in the said proceedings, and to make opposition to the aforesaid account of administration, alleging that the same is full of errors, and if homologated, every thing the accountant possesses, will be covered and absorbed by the claims of said heirs. They further state, that the credits of the community are vastly exaggerated, while its debts are represented as being far below the amount actually due at the time of its dissolution; that shouldsaid account be homologated, the accountant would forcibly be brought into absolute insolvency, even in relation to his own children; and proceeding to set forth the divers grounds of opposition upon which they rely, they pray that the account presented by J. F. Canonge, be amended according to the corrections by them pointed out; that the opposition be taken as the basis of the liquidation; and that whatever amount may come to the defendant from the said liquidation, be applied to the satisfaction of their judgment, &c.

The heirs of Dominique Bouligny, deceased, who had become in his lifetime the surety of J. F. Canonge, on the bond of tutorship by him furnished, also intervened, and joined Armand, and Alfred Mercier in their oppositions to the said account, and prayed accordingly.

Issue was joined on the oppositions; and, after a full investigation of the matters in controversy arising from the various grounds alleged against the homologation of the account rendered by the defendant, a long and argumentative judgment was pronounced by the Judge, *a quo*, sustaining generally the said oppositions, amending the account accordingly, and liquidating the balance due to the heirs of Mrs. Canonge, (exclusive of the landed property inherited by their mother, and now in kind, and their recourse against the slave Uranie,) at the sum of $28,992 39. From this judgment, the heirs of Mrs. Canonge, and the defendant and accountant have appealed.

The appellants' counsel have only called our attention to the opinions expressed by the inferior court, on six of the seventeen

heads of opposition, as containing the errors complained of in the judgment appealed from; and as they present distinct and separate questions, the solution of which is necessary to arrive at a proper and final settlement of the rights of the parties, we shall proceed to examine them in the order adopted by both counsel, in their oral and written arguments.

I. This grows out of the second ground of opposition, which bears on three items of the account, representing the hereditary portion of Mrs. Canonge, to wit, *nineteen feet of ground*, valued at $12,666; *ten feet of ground*, valued at $5000; and *the slave named Uranie*, valued at $1100. This property was inherited by the deceased from her father's estate, and was allotted to her in the partition thereof. It appears, that the two lots of ground have never been sold or alienated, and exist in kind; but the slave Uranie was sold by the surviving husband for a less price than the amount of her appraisement, at the time of the partition of Mercier's estate. The Judge, *a quo*, was of opinion that the lots of ground should not be made to figure in the account at any price, at all; and that the slave, having passed with a vicious title into the hands of the purchaser, she not being the property of the seller, the parties in interest should be left to their recourse for the recovery of the slave, if they think proper to exercise it.

We think the Judge, *a quo*, did not err. The owners of the lots of ground, and of the slave Uranie, figuring in the account under their original appraised value, are exercising their rights in this action contradictorily with parties whose rights and pretensions are conflicting with theirs, and they cannot, therefore, obtain any undue or illegal advantage, which would turn to the prejudice of their opponents' claims. Now it appears, that the lots exist in kind, but that they have been largely built upon; and it is said, that they are so mixed up with other lots, that it will be very difficult, if not impracticable, to separate them, or to make a correct relative estimation of their value; and this is given as a good and valid reason why the accountant should keep them for his own account, at their estimated value. We think otherwise. It is a well established rule, that in the settlement of a community between the spouses or their heirs, the property brought in marriage, or acquired during marriage by either of them, and which exists in

kind at its dissolution, must be withdrawn by the owner thereof, in the condition in which it may be at the time of the dissolution; if it consist in lands built upon, or improved during the marriage, the owner of the soil has a right to keep the improvements, on accounting to the other for one-half of the enhanced value of the property. Civ. Code, art. 2377. *Babin* v. *Nolan*, 4 Rob. 278. 6 Ib. 508. 10 Ib. 373. But it cannot be pretended, that he should have the right of abandoning the soil to the other spouse or to the community, and of claiming in its place, the amount of its original estimated value. This would often be unjust, as the property may be greatly depreciated; and as the value of the soil so fixed, might perhaps oftentimes be higher than the actual estimation of the whole property with the improvements. The appellants must take the property in kind, and cannot be entitled to charge their father with the amount of an estimation which might perhaps prejudice the rights of others.

With regard to the slave Uranie, it is not pretended that she was sold by the defendant during the marriage. She was alienated by him during the tutorship, and was the property of the children and heirs of his deceased wife. If the slave had not been sold, the appellants would have found her as a part of their estate, and would have taken her in the state of depreciation in which she must necessarily be, after a great number of years; and it seems, therefore, unjust to allow them an amount which they could not get for her, if she was to be sold. It may be hard for them to be under the necessity of repudiating the sale made by their father; but as third persons are interested, they cannot be permitted, by their ratification of his illegal act, to lessen the security which others have acquired.

II. This relates to the sixth ground of opposition, which complains of the charge of $3000, contained in the account rendered, as being the amount of stock held by the community in the Bank of Louisiana. It appears, that after its dissolution, the tutor borrowed $2700 from the bank for his private use, on the pledge of the stock. We agree with the Judge, *a quo*, that the stock remained the property of the community, and that the accountant should be charged only with the amount of the loan, as being the only sum from which he benefitted in the alienation of the stock.

This amount appears to have been allowed in the judgment appealed from, as it is included among the different sums forming the aggregate of $36,490, substituted by the Judge, *a quo*, to that of $45,090, as the amount of property and effects disposed of by the accountant since the dissolution of the community.

III. This item, which forms the seventh ground of opposition, has been the subject of much discussion in the arguments in this cause; and we are free to confess, that we have not found the conclusion which we have ultimately adopted, free from serious difficulties, although we feel confident that, under the circumstances of the case, it is perfectly concordant with the principles of equity and moral justice, which ought to govern the conflicting rights of the parties. It relates to a charge of $10,000, carried in the account rendered to the credit of the community, as being the value of ten shares in the Orleans Insurance Company, and given by the tutor in payment of his individual debt to the Louisiana State Bank. Our first impression was, that the opinion of the Judge, *a quo*, allowing only $3500, as the real value of the stock, at the time the *dation en payement* was executed, was erroneous, and that the whole amount of said stock should be accounted for by the defendant; but, after further deliberation, it has appeared to us, that our first view of the question could not be maintained, without operating unjustly on the rights of those who may be interested in establishing the real value of said stock, not only at the time of its alienation by the accountant, but also at any subsequent period thereafter, in order to show that the price paid for it, was rather the result of the circumstances under which the sale was made, than a true standard by which its real value could be ascertained.

At the dissolution of the community, only $1000 had been paid on account of this stock, and there remained $9000 to be paid subsequently; no funds were received or disbursed by the accountant, and the balance due was made up of the profits realized on the stock in different years, and placed to the credit of the stockholders on the books of the company. In 1841, an amicable arrangement was made between the defendant and the Louisiana State Bank, to which he owed a sum of $17,922, the amount of several promissory notes, secured by pledge on the stock in

question, and that of the Levee Cotton Press Company, by which said stock was transferred in payment of his notes; and a witness, who was acting as the counsel of the Bank in this transaction, and in the collection of the notes, states in his testimony, that having been applied to by Canonge *to propose to the Bank to take the stock in payment* of his debt, *he*, the witness, *from the information he had at the time of the real value of said stock, recommended the Bank to take the same in payment, inasmuch as he considered Mr. Canonge unable to pay otherwise at the time.* He further states that, *in* 1842, *two shares of the same stock were sold at* $300 *per share; that it rose in value for several months afterwards, when it fell again after the fire that destroyed the lower cotton press; and that, in advising the* dation en payment, *he took into consideration the pecuniary embarrassments of Mr. Canonge; otherwise, he considered the stock, if sold at that time, was not worth the amount due, &c.* It is also admitted in the record, that *the stock in question, in* 1841, *was worth, and could only sell for* $300 *per share.*

Under this evidence, we think the Judge, *a quo*, did not err. The proof is conclusive that, in 1841, the stock was not worth the amount paid for it; that its real value did not extend beyond the amount allowed in the judgment appealed from; and that if it was disposed of by the tutor *at a par value* in discharge of his individual obligations, this was occasioned by the circumstances attending the collection of the debt he owed to the Bank, and in payment of which the stock was received. The appellants, who have not disputed the sale made by the defendant, have not attempted to show that said stock has ever commanded a higher value in the market since the transfer thereof was made; and, for aught we know, had they thought proper to inquire into its actual value at the time of the rendition of the account, it might, perhaps, have been found that it was then under a greater depreciation than at the time of its alienation. Be this as it may, it was the duty of the appellants to show it, in order to establish that they had suffered a real loss from the act of their tutor, which, on the contrary, they seem to ratify; and as, from the purport of art. 333 of the Civil Code, *the tutor is only bound to return to the minor the estimated value of those moveables*

which he cannot restore in kind, we are of opinion that, notwithstanding the defendant has been benefitted, under the extraordinary circumstances of the transfer, to the whole amount of the stock, the appellants are only entitled to recover its real value, such as it has been shown, and is admitted to have been, at the time it was alienated.

IV. This grows out of the eleventh ground of opposition. It has reference to a charge of $9680, which, owing to an error of calculation in the account, was reduced by the Judge, *a quo*, to the sum of $8700. This charge is the result of dividends accrued from the stock held in community in the Louisiana Bank, and the Louisiana State Bank, received by the tutor since the death of his wife, and was properly placed to the credit of the community. We concur also, with the inferior Judge, as to the interest paid on the debts of the community, which, we think, were properly charged on the debit side of the account thereof, and this is even admitted by the appellants' counsel.

V. VI. The issues presented by the thirteenth, sixteenth, and seventeenth heads of opposition, are so closely connected, that we have thought it more adviseable to consider them together, so as to come more properly to the solution of the main question growing out of the sixteenth, and which must necessarily cover the others. It is this: the opponents contend, that the defendant should have credited himself with the expenditures incurred since the dissolution of the community, for the maintenance and education of his children; and they say, that such expenses, being not less than $600 a year for each of them, have far exceeded any amount of interest or of income which they might be entitled to, by reason of their interest in the succession of their mother. This opposition was sustained by the inferior Judge, who, in his judgment, proceeded to ascertain from the evidence the amount of the expenses incurred for the maintenance and education of the children of the deceased, and whether said amount was sufficient to absorb all the revenue proceeding from the property by them inherited; and he came to the conclusion, that those expenses, having exceeded their income by one or two hundred dollars annually, the heirs were not entitled to recover any part thereof, either from the hire of the slaves, from the rents of the property of the

succession, or from the interest that might have accrued to them from the time of the dissolution of the marriage, upon the amount of that portion of the dotal and paraphernal property of the deceased, which was disposed of by the husband during the existence of the community.

We are satisfied from the evidence, that the annual expenses of the children of J. F. Canonge, most of whom received their education in France, must have amounted to between $500 and $600 a year. Nay, the record contains an admission, not only *that since their return from France, all the children of J. F. Canonge have lived on the common stock*, but *that the annual expenses for each of them can fairly be set down at from* $500 *to* $600 *a year.* Hence, the question occurs: Can the appellants have the benefit of the revenues proceeding from the property by them inherited and administered by their father as their tutor, without being bound to compensate therewith the amount of the expenses incurred by their maintenance and education?

When this question was first presented to our consideration, on the submission of this cause without argument, we were impressed with the idea, that parents were legally permitted to abstain from claiming from their children the reimbursement of the expenses necessitated by the fulfilling of that sacred duty which they owe to their offspring, to wit, that of supporting and educating them, or from taking such expenses out of the latters' revenue. But here, third persons who have conflicting rights to exercise contradictorily with the appellants, are interested in its solution strictly according to law; and, after a thorough and attentive reconsideration of the proposition as it was originally insisted on by the appellants' counsel with much force and plausibility, we have been prompted to recognize its inapplicability to this case, and to come to a different result.

It is worthy of remark that, from the state of the affairs of the community at the time of its dissolution, there was but little, if any thing, to be expected from its liquidation, in favor of the heirs of the defendant's deceased wife. Thus, it is obvious, that the appellants, whose rights to the property of the said community were eventual, and who could not set up any pretensions thereto until after the payment of its debts, and its complete liquidation, were left to their own resources, as derived from the estate of

their mother, which had come under the administration of the defendant, as their tutor. The latter had no property of his own, and, for aught that appears, he was entirely destitute of any tangible means of providing for the support and education of his children, except so far as they might proceed from the administration of the tutorship, or from that of the community, which though dissolved by the death of the defendant's wife, remained for a series of years, unsettled and unliquidated.

Now, it is true, that, under art. 243 of the Civil Code, fathers and mothers, by the very act of marrying, contract together the obligation of supporting, maintaining, and educating their children; that they have, during marriage, the enjoyment of the estates of their children, until their majority or emancipation, (Civ. Code, art. 239,) and that the obligations resulting from said enjoyment are, among others, to support and educate their children according to their situation in life. Civ. Code, art. 240. But the administration and enjoyment of the estate of his minor children, is given to the father, during the marriage only. Civ. Code, art. 267. After its dissolution he becomes their natural tutor, and keeps the administration of their property as such, subject to the duties, responsibilities, and obligations prescribed by law with regard to all other tutors. Civ. Code, art. 268. *As such, he is bound to account for the revenues of the property of his pupils, subject to the expenses of their education, according to their means and condition in life.* 10 La. 98. Their expenses must be regulated according to their condition and their fortune, and ought never to exceed their revenues; and, in case of insufficiency of the latter for procuring their education or subsistence, nothing can be taken from the capital of their estate, unless the tutor is authorized to do so by the advice of a family meeting. Civ. Code, art. 343. Thus, it is clear, that the revenues of minors, under the natural tutorship of their father, must be applied to defraying the expenses occasioned by their maintenance and education; that the law makes no distinction as to the kind of tutorship under which their estates are administered; that the alimony due by ascendants to their descendants who are in needy circumstances, is only required and granted in proportion to the wants of the person requiring it, and the fortune

of those who owe it; (Civ. Code, arts. 245, 246, 247;) and that when children have property from which a sufficient income may be derived to provide for their subsistence and education, the natural obligation of their father ceases, after the dissolution of the marriage; and that then their expenses ought to be provided for out of the revenues of their property, *pro tanto* at least, if insufficient. This doctrine is also fully developed by Pothier, Contrat de Mariage, Nos. 384, 390. Merlin, Repertoire de Jurisprudence, *verbo*, Aliment. Toullier, vol. 2, p. 293. Duranton, vol. 2. p. 387. Favard de Langlade, vol. 1, p. 151; and has been sanctioned by the Court of Cassation in France, in a decision reported by Sirey, vol. 13, partie 1, p. 457, in which its opinion is expressed thus: "*Attendu qu'il est de principe naturel et civil que tant que le mineur n'a pas de revenus pour subvenir aux frais de sa nourriture, entretien et education, le père doit y pourvoir; néanmoins cette dette de paternité cesse lorsque les revenus du mineur augmentent d'une manière suffisante.*" Here, the appellants' revenues were absorbed by their expenses, and we must conclude that the Judge, *a quo*, decided correctly in excluding them from the account rendered by the defendant. Indeed, the latter himself recognizes in his account, to a certain extent, that his children are not entitled to recover them, when he says, in relation to the revenue derived from the other property of the community, after the item of bank dividends: "*Le reste des revenus a dû être absorbé par les dépenses et les charges de la communauté.*" It ought to be so with regard to all the revenue, which, from the evidence, was clearly insufficient.

As the appellees have not prayed that the judgment appealed from be amended in any respect, we have been precluded from examining any other ground of opposition. It suffices to say, that those which have been brought to our notice by the appellants, were correctly sustained; and, upon the whole, we think, that, so far as it goes, the liquidation of the appellants' rights and of the community, has been fairly and justly made, and that the account rendered with its amendments has been properly approved and homologated; leaving, however, for further adjustment and liquidation, the proceeds of the other com-

munity property, if any there be, which may exist in kind, and which may be hereafter the subject of a final settlement between the parties according to their rights thereto.

*Judgment affirmed.**

Soulé, for the plaintiffs.

A. Canonge and *Roselius*, for the appellants.

Grima, for the heirs of Dominique Bouligny.

CELINA CHABERT *v.* JOSEPH A. BEARD and another.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

F. B. Conrad, for the plaintiff.

Eyma, *Van Dalson*, and *Goold*, for the appellants.

MORPHY, J. This action is brought to recover $1270 59, being the balance of an account current between the defendants and Leon Chabert, the plaintiff's husband, on the ground that, in the latter's dealings with them, he acted as her agent, and advanced them funds belonging to her. The defendants admit their indebtedness in the sum claimed; but aver, that they owe it, not to the plaintiff, but to the creditors of her husband, who, since this balance was struck, has been declared a bankrupt. There was a judgment below in favor of the plaintiff, and the defendants have appealed.

The record shows that Chabert failed in 1840; that a separation of property was pronounced between him and his wife, in June, 1841. That, after the community of goods theretofore existing between them, had thus ceased, she constituted her husband her general agent for the management of her property, and the investment of her funds, and gave him, to that effect, the

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* *Roselius*, prayed for a re-hearing in this case, contending, that though the transfer of stock by the tutor in payment of his individual debts was unauthorized and the minors not bound by the alienation, they had a right to ratify and profit by the transaction, if they thought proper to do so; and that the creditors of the surviving husband cannot compel him to charge his minor children with the expenses of their support and education.

Re-hearing refused.

most extensive powers. That in October, 1841, the plaintiff obtained from the Citizen's Bank, the discount of a note of $2000, drawn by her to the order of, and endorsed by, F. Grima, and secured by mortgage on certain slaves belonging to her. That the net proceeds of this note were placed in the hands of the defendants by Chabert, for his wife's account, to be used in speculating in negroes, to be purchased in Carolina, and brought here for sale. That some time after, to wit, on the 10th of August, 1842, a balance was struck, showing $1276 51 to be due to Chabert, who subsequently became a bankrupt in the United States Court, and was discharged in July, 1843. Although the account current sued on is made out in the name of Chabert, the evidence satisfies us, that the defendants knew that the net proceeds of the note of $2000, which figure in it as received by him, were the property of his wife, and were placed in their hands for her account; and they accordingly promised, on various occasions before the institution of this suit, to pay the money to her as soon as they could. It is not pretended that the balance acknowledged by the defendants to be due on this account current was put down on Chabert's schedule as a debt due to him, nor that his assignee has ever set up any claim to it, although due since August, 1842. Under these circumstances, we think with the Judge below, that the plaintiff should recover of the defendants this balance, as money placed in their hands for her account, by her husband and agent.

Judgment affirmed.

Lewis Alston Collier *v.* His Creditors.

A., for the accommodation of B., drew a bill on the latter, in favor of C., which was accepted, but protested for non-payment by the payee. After the protest, B., to secure A. from any loss in consequence of his failure to pay the bill, gave the latter a mortgage on a plantation and slaves. C., having afterwards recovered judgment against A. and B. for the amount of the bill, assigned the judgment to D., who was subsequently, in consideration of releasing A., subrogated by the latter to his mortgage on the plantation and slaves. It was not proved that A. paid anything as drawer on the bill: *Held*, that the mortgage in favor of A., being intended only to indemnify him against any loss in consequence of the non-payment of the bill, and not to secure the payment of the bill itself, the contract

was personal to A.; that the event, with a view to which it was executed not having occurred, the mortgage never took effect; and that consequently D. acquired nothing by the transfer of the rights of A.

When the holder of a protested bill becomes the purchaser of property belonging to the acceptor, sold at the suit of a third person, subject to certain mortgages, for a price exceeding the amount of the previous mortgages, the debts will extinguish each other by operation of law, to the amount of the smallest, by compensation, C. C. 2204. The amount due by the purchaser, after satisfying the previous mortgages, is sufficiently certain. *Id certum est quod certum reddi potest.*

The purchaser of property sold under execution subject to special mortgages, is entitled to retain out of the price the amount required to pay such mortgages, C. P. 679, 683. But this privilege being allowed merely to protect him from the danger of paying twice, where the debts secured by mortgage have been extinguished by prescription or otherwise, the purchaser can no longer retain the amount. The extinction by prescription, after the purchase, of a debt evidenced by a note and secured by mortgage, and which formed a part of the price, enures to the benefit of the mortgagor, not of the purchaser. *Per Curiam:* The debt due by note is prescribed by five years from its date, while the obligation of the purchaser to pay the price is only prescribed by ten years.

Where the purchaser of property sold under execution, subject to a special mortgage given to secure the payment of a note, retains the amount of the mortgage as a part of the price, and subsequently makes a partial payment to the mortgagee, the payment will interrupt prescription both as to the original debtor and the purchaser, being made in discharge of the former, and with his implied assent.

The holder of a protested bill purchased property of his debtor, sold at the suit of a third person subject to a mortgage, the payment of which was assumed by the purchaser as a part of the price. The latter subsequently transferred the bill to a fourth, and after the transfer, the debt secured by mortgage was extinguished by prescription: *Held*, that the amount of the debt so extinguished not being due to the mortgagor until the note was prescribed, and the purchaser having previously transferred the note, no compensation could take place between the debt evidenced by the note, and that for the amount of the mortgage assumed by the purchaser. C. C. 2205.

The holder of a note given by the purchaser for the price of property, secured by mortgage on other property, cannot recover interest from maturity, where the note was not protested. The mortgagee of property producing fruits is not entitled to legal interest, without a demand or an agreement to that effect, as an equivalent for the fruits received from the property. *Aliter*, as to the vendee of such property. C. C. 2531.

Interest in favor of creditors holding mortgages upon property surrendered by an insolvent, ceases to run from the date of the sale of the property.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Stockton, appellant, *pro se*. *Steele*, on the same side.

L. Peirce, for the syndic.

Huston and *Finney*, for Montgomery & Boyd.

MORPHY, J. Richard C. Stockton opposed the homologation

of a provisional *tableau* of distribution filed in this case, claiming to be put down on it as a mortgage creditor of the insolvent. The circumstances under which he claims are these: In December, 1835, John S. Alexander, for the accommodation of Walter Byrnes, drew upon the latter, in favor of L. A. Collier, a bill of exchange for $10,616 64, payable three years after date. This bill was accepted, but not paid by Byrnes at its maturity. Shortly after the protest of the bill, Byrnes, with a view to secure Alexander and save him harmless from any loss he might sustain in consequence of its non-payment, gave him a mortgage on his plantation and slaves on lake St. John, in the parish of Concordia. On the 9th of April, 1839, the plantation and slaves of Byrnes were seized and sold under divers executions, and, at the sheriff's sale, Collier, the insolvent, became the purchaser of the property for $71,000. It was burthened with mortgages to an amount of about $65,000, exclusive of, and having a preference over, that for $10,616 64, executed in favor of Alexander. With the exception of the amount necessary to satisfy the writs under which the property was sold, the purchaser retained in his hands the whole price. On the 5th of September, 1843, Collier, who had recovered judgments against Byrnes and Alexander on the protested bill of exchange for $10,616 64, transferred them to the opponent, R. C. Stockton. On the 4th of January, 1844, the latter was subrogated by Alexander to all his rights of mortgage on the plantation and slaves in the possession of the insolvent, in consideration of a release granted to him by Stockton as owner of the judgment recovered against him by Collier. Among the mortgages existing on the property of Byrnes at the date of Collier's purchase, there was one given to secure a debt of $12,000 in favor of Wm. Primm, for which Byrnes had executed several promissory notes. Of these, one for $1800 became due on the 15th of January, 1837, and one for $4800 fell due on the 15th of January, 1840. These two notes do not appear to have been paid by Collier. In February, 1845, R. C. Stockton caused an execution to issue against Byrnes, by virtue of the judgment assigned to him by L. A. Collier. Under this writ all the rights and claims of Byrnes against the estate of the insolvent, were sold and bought by Stockton for $500. Under this state of facts, he claims

to be a mortgage creditor: 1. For $6000 as transferree of Collier's judgment against Byrnes and Alexander, and also of Alexander's rights of mortgage against the property surrendered as derived from Byrnes the former owner, the said sum being the surplus of the bid of $71,000, over and above the anterior mortgages. 2. For the aggregate amount of the notes of $1800 and $4800, with legal interest from maturity, which, he contends became due to Byrnes, whose rights he has acquired, as soon as the debt evidenced by these notes was extinguished by prescription, this amount having been retained by Collier as a part of his bid, and for the purpose of paying these notes. There was a judgment below dismissing Stockton's opposition, from which he has appealed.

I. The mortgage given by Byrnes to Alexander, was intended o indemnify and save him harmless from any loss in consequence of the non-payment of the bill for $10,616 64, drawn for his accommodation, by Alexander. It was not given to secure the payment of the bill itself, and could not avail any holder of it. The contract was a personal one with Alexander, for his indemnification in case he suffered a loss. It is not pretended that he paid anything as the drawer of this bill; he never, therefore, became the creditor of Byrnes, and no obligation or indebtedness ever existed in his favor to which the mortgage could attach. The mortgage never took effect, because the event in view of which it was given never occurred. If Alexander himself was not entitled to the mortgage, Stockton acquired nothing by the transfer of his rights. But were it even admitted, that the latter could avail himself of this mortgage, to claim $6000 as the amount due by Collier on his bid over and above the mortgages prior to it on the property, it is urged by the syndic's counsel, that the mortgage was extinguished by compensation, Collier having become indebted to Byrnes for this balance at the time he held Byrnes' acceptance on the protested draft for $10,616 64. To this it is objected, that the balance due by Collier was not certain and liquidated; that among the prior mortgages on the property, some were judicial, others were conventional; and that the certificate of mortgages in several instances, does not give the rates of interest due on them, the dates from which it was to run, the costs incurred under the

judgments, &c., and that, therefore, no compensation took place. The exact amount of the mortgage debt due on the property, might not appear from the certificate of mortgages, and yet be certain, or easily ascertained. *Id certum est quod certum reddi potest.* The sheriff's sale having taken place on the 9th of April, 1839, the interest, costs, &c., due on the recorded mortgages, were to be calculated up to that date; and the balance remaining was the amount due by Collier on his bid. The opponent does not appear to have had much difficulty in ascertaining that balance to have been $6000, which he now claims under the mortgage transferred to him. From the moment the two debts due by Collier to Byrnes, and from Byrnes to Collier co-existed, they extinguished each other, by operation of law, to the amount of the smaller debt, and Byrnes remained liable to Collier only for the difference. Civ. Code, art. 2204. Had Alexander paid this surplus, he could not have come against the property: as it had been sold under seizure, and had not produced a sum sufficient to pay the full amount of his mortgage for $10,616 64, he could only have had personal recourse against Byrnes.

II. It is clear, that on the adjudication of the property to Collier, all the mortgages covered by his bid were a part of the price for which the sale was made, and that he became bound to pay them as such. He was authorized to retain, and did retain, the amount of the notes given by Byrnes to Primm, in order to apply that portion of the price to the payment of said notes whenever they should be presented. Code of Pract. arts. 683, 679. This privilege is allowed to the purchaser, to protect him from the danger of paying twice, which would exist, if, notwithstanding the mortgage claims on the property, he was to pay the whole price of his adjudication. He is bound to pay the purchase money, either to the holders of the mortgages when they come against the property, or to the former owner of it. If the claims of the former have been satisfied by the original debtor, or happen to be otherwise discharged, so that the property is relieved from the mortgages, there can be no good reason why the purchaser should continue to retain the price, which he was allowed to keep only for the purpose of discharging such claims. It is urged by the syndic's counsel that, as the insolvent Collier took the place of

Byrnes as to the debt due to Primm, the prescription of that debt should enure to him, and, through him, to his creditors. To this position we are by no means prepared to give our assent. The debt due by Byrnes, being evidenced by the notes he had given to Primm, was prescribed at the end of five years, whereas Collier's obligation to pay the price of the property adjudicated to him, could be prescribed only by the lapse of ten years. The privilege allowed him of retaining a part of the price in order to pay these notes, and thereby relieve the property from the mortgage given to secure them, did not change the nature of his obligation, which is evidenced by the sheriff's deed of sale. In *Perry* v. *Holloway*, (10 Rob. 107,) this court said: "The purchaser is bound to pay the previous incumbrances as a part of the price. If it should turn out that a special mortgage, or a privilege, should be certified to exist upon the property which in fact had been extinguished or had never attached, &c., the owner himself, we doubt not, or his creditors in case of a surrender, might recover of the purchaser the amount thus erroneously adopted and estimated as a part of the price." Whether a mortgage was at the time of the sale erroneously supposed to exist, or whether it did really then exist, but was afterwards extinguished by prescription or otherwise, without any agency of the purchaser, the obligation of the latter to pay the portion of the price retained to secure himself against the mortgage claim, appears to us to be absolutely the same. Although Collier, by keeping the $12,000, the amount of Primm's mortgage, might be considered as assuming or promising to pay Byrnes' several notes, the latter continued to be bound, and might at any time have been called upon for payment by any of the holders. They could become the creditors of Collier, only in case they chose to accept the *stipulation pour autrui* resulting from such assumption. On one of these notes, that for $1800, the holders, Montgomery & Boyd, appear to have received from Collier $49 89, on the 23th of August, 1840. This payment interrupted the prescription running against them as regards Byrnes as well as Collier, the latter having made it in discharge of the former, and with his implied consent. The note of $4800 does not appear to have ever been presented for payment either to Byrnes or to Collier.

The insolvent's estate is therefore discharged from the obligation of paying it to the holder, whose claim is extinguished by prescription; but it has become liable to Byrnes for the money retained to meet its payment. It is urged, that if the $4800, the amount of the note prescribed, reverted to Byrnes as a part of the price of his property sold in 1839, Collier, who owed this sum, was at the time the holder of the protested draft for $10,616 64, accepted by Byrnes, and that compensation took place, by operation of law, between the two debts to the extent of their respective amounts. To this the answer is, that the note was not prescribed until long after Collier had transferred to Stockton the judgment he had obtained upon the bill; that until the note was prescribed, its amount was not due to, nor demandable by Byrnes; that consequently, no compensation took place before such transfer, and there could be none after it, as Collier had ceased to be the creditor of Byrnes. Civ. Code, art. 2205. As relates to the interest claimed by the opponent from the maturity of the note, it was not due by Collier, as the note was never protested, and was not given for the price of a thing sold. It appears from the record, to have been only secured by a mortgage on land previously sold by Primm to Byrnes. It is the vendor, and not the mortgagee of property producing fruits, who is entitled to legal interest without any demand, or agreement, as an equivalent for such fruits received by the purchaser. Civ. Code, art. 2531. If interest be claimed as due, because the money retained to pay Primm's notes was itself the price of property producing fruits, such interest could have been claimed by Byrnes only from the 15th of January, 1845, when the note became prescribed, and his right to receive it accrued. The property surrendered by the insolvent was sold some time in August, 1844, after which time interest ceased to run in favor of all creditors holding mortgages upon it.

It is, therefore, ordered, that the judgment of the Parish Court be reversed, and that Richard S. Stockton be placed on the *tableau* of distribution as a mortgage creditor for $4800, to be ranked after the mortgages created on the property surrendered by Walter Byrnes, but before any of those granted by the insol-

vent; and that the *tableau* thus amended be homologated; the costs of both courts to be borne by the estate.*

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* *L. Peirce*, for a re-hearing. The contract between Collier and Byrnes was not voluntary, but an obligation solely created by the law.

The obligation, created by the Code of Practice is, that *Collier* shall pay Byrnes' note to *Primm*. The law makes him assume this. There is no *stipulation pour autrui*.

The authority from 10 Rob. quoted by the court, is sound law, but it is not the case in controversy. There the debt did not exist, at the time of the judicial sale. The law "*si quis, (de fidei-jussoribus*") declares *null* any act by which a person obliges himself for a debt extinguished.

But here the law compels Collier to assume a debt due by Byrnes to Primm, evidenced by a promissory note: for *so much then his obligation* is not a contract to pay the purchase money of a plantation prescribable in ten years, but an obligation created by law, to pay *a promissory note* secured by mortgage and to be prescribed in five years. He is the *debtor* marked out by law. No doubt Byrnes is also a *debtor;* but the *debtor created by law*, with the *mortgage* on his back, is *Collier*.

Now what is prescription? "*Solventi similis est qui præscribit*,"—it is payment. Who is presumed to have *paid?* the man who owes *simply*, or the man who owes, and has a mortgage encumbering his plantation on account of it?

It is of more importance to Collier than to *Byrnes* that he should have paid; and if prescription be payment in law, Collier must be presumed to have paid.

Who would have been the real defendant, if Primm had sued Byrnes on the promissory note, before being prescribed? It has been often decided, that the person called in warranty is the real defendant. Was not Collier the defendant in warranty? Byrnes would have turned to him. Primm would have himself sought the owner of the property mortgaged, and have endeavored to realize the amount due to him from the sale of it.

If then the *purchaser*, *Collier*, was obliged to pay; if he would have been in any court the defendant in a suit upon the note; is it not illusory to give the benefit of prescription to Byrnes, and make him *gain* $4800, which by law Collier is presumed to have paid?

2. Admitting that the doctrine established by the court is correct, and that prescription avails Byrnes only, yet Stockton is not properly *classed*.

The certificate of mortgages shows, that the only mortgage recorded was *that to secure Primm's notes;* this being prescribed in five years, the mortgage was also extinguished.

Therefore, no mortgage is recorded against subsequent mortgagees for this part of the *purchase* money due by Collier to Byrnes; there is nothing but the privilege of the vendor, which, not being recorded, must yield to subsequent creditors of Collier by mortgage. The court should therefore have given a preference to the mortgages made by Collier himself, to the unrecorded privilege.

3. There may have been an interruption of prescription, and it ought not to be

determined that the right has accrued absolutely to Byrnes, without giving the unknown holder of the note an opportunity to establish the fact. He has not appeared, nor is he a party to, or represented in the proceedings; and he should be heard before a decision is pronounced, hostile to his interests. This is a debt created by *Byrnes* originally, and the syndic of *Collier's* creditors has no right, under the decisions of this court, to release any mortgage created by a previous owner of the property, except perhaps in the case of his paying the mortgage creditor. If, therefore, after payment to Stockton, the holder of this note should appear, he might proceed against the property in possession of the purchaser at the syndic's sale; and should he prove ani nterruption of the prescription, (on that plea being opposed to him as a bar to his action,) the innocent purchaser, who has already advanced his money, would be compelled to pay over again; and he certainly has a right to the protection of the court *now* against an event, the possibility of which is illustrated by the case of the note for $1800, held by Montgomery & Boyd, and which was claimed by Stockton on the same grounds.

4. The sheriff's sale of Byrnes' plantation, &c., was a *forced* sale, a sale for the benefit of his *creditors;* the price bid was the *absolute* price, as the only portion thereof to which *Byrnes* was entitled, was the *surplus* over and above the incumbrances. There was no *privity* of contract between *him* and the purchaser; and, if a surplus existed, it was to the officer of the law he was to look for it. The *purchaser* never contracted to pay any part of the price to *him*, but to the creditors having liens; and, if any surplus, to the Sheriff. If, therefore, he could have any right against Collier, it could only be as *subrogated* by payment to the rights of some *creditor*, whom Collier had, by his bid and the operation of law, bound himself to pay. The case is precisely analogous to the syndic's sale of the property of an insolvent; there is no privity between the insolvent and the purchaser, and he has nothing to do with the price. He can only claim from the *syndic* the *surplus* after payment of all the debts; and, if such sale were on a credit, or any part of the price consisted in the assumption of prior incumbrances, and they became prescribed as against the syndic or prior mortgagees, it would hardly be said that the insolvent could become subrogated to his creditor's rights by such a process.

Prescription is an *exception*, and *means of defence*, but it is not *a cause of action*,—it is at best a bare presumption of law of payment by a debtor, owing to the silence of his creditor for a certain lapse of time. It is not a *proof* of payment from which a legal subrogation would result to all the rights of the creditor, or, in other words, a cause of action; and the claim in this case, can only be supported on the supposition, that Byrnes was subrogated to the rights of the mortgage creditor since he had none himself, never having been privy to the *forced* sale, and Collier never having either directly or by legal intendment, made any promise or come under any obligation to him personally.

Re-hearing refused.

WILLIAM G. KENDALL, for the use of John P. Gray, *v.* HORACE BEAN and others.

The private account books of brokers are not admissible in evidence in their favor (C. C. 2244); but witnesses by whom entries were made in them, of matters within their personal knowledge, may refer to such entries to refresh their memory.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Kendall, pro se.

Barker, for the appellants.

MORPHY, J. This action was brought upon a receipt, or certificate of deposit for $1000, in notes of the Agricultural Bank of Mississippi, which bore interest, the same having been presented for payment to that institution and payment refused. The certificate, which bears date the 30th of May, 1842, and is signed by the defendants, describes the notes handed to them by the plaintiff, and concludes by saying that they "promise to pay to him forty-five cents on the dollar, face, and interest, or return him the said notes on his calling for the same, and the return of this receipt." The petitioner alleges a demand of the defendants, and refusal on their part to comply with the terms of the certificate, and asks for a judgment against them. The answer admits the receipt of the Agricultural Bank notes by the defendants on the terms and conditions of the instrument sued on; but alleges that on, or about the 22d of June, 1842, the plaintiff applied for the said notes which they had been unable to dispose of; that the notes were produced, and were about to be delivered to the plaintiff when he expressed a desire to sell them, saying that he wanted the money for immediate use, offering to accept of forty cents on the dollar, face, and interest to that date, which the defendants agreed to give, and actually paid into the hands of the plaintiff the proceeds amounting to $459 28; but, that as it was not usual for defendants to issue certificates of deposit, and they did not recollect having given one in the present case, they omitted to require its return when they paid the money. This cause, which was before us, in May, 1844, on an appeal taken by the defendants, was then remanded for a new trial, this court not being fully satisfied with the conclusion arrived at by the Judge below. On the

second trial, some additional evidence was given by the plaintiff, in whose favor there was again a judgment, from which the defendants appealed; but, by consent of parties, the case was a second time remanded at the costs of the appellants. The cause was then placed before a jury, whose verdict was in favor of the plaintiff, and the present appeal is from the judgment entered up on that verdict.

Most of the evidence adduced on the last trial, is in relation to a collateral issue made up between the parties, to wit, whether the plaintiff was, or was not in New Orleans, on the 22d of June, 1842, when the payment pleaded by the defendants is alleged to have been made. The testimony of several witnesses was taken under commissions, and various letters written to, and by the plaintiff about that time, were given in evidence. The plaintiff has succeeded, we think, in rendering it somewhat probable, but by no means certain, that he was not in New Orleans at the date in question. Had his absence from the city at that particular time, been shown beyond the possibility of any doubt, it would have been conclusive, as it was to him personally that payment is alleged to have been made.

Our attention has been drawn to a bill of exceptions taken to the opinion of the Judge, who refused to admit in evidence the books of the defendants, which they had offered to corroborate by the testimony of their witnesses, as to the days on which the several transactions took place, and to prove in whose hand-writing the original entries were made. The Judge, we think, correctly held, that the books of the defendants could not be admitted for any purpose whatever; but that witnesses, who had made entries in them of matters within their personal knowledge, might refer to such entries to refresh their memory. The Civil Code expressly provides, that the books of merchants cannot be given in evidence in their favor. Art. 2244.

On the merits, which present only a question of fact depending on the testimony and credibility of witnesses, a careful examination of the evidence, and of all the circumstances of the case, does not enable us to say, that the verdict is so clearly erroneous as to make it our duty to disturb it.

Judgment affirmed.

The Bank of St. Mary *v.* William S. Morton.

Where the proceeds of property sold by a factor had been transferred to a third person for a valuable consideration, and notice of the transfer given to the factor before the issuing of an attachment at the suit of a creditor of the original owner, the attachment must be set aside. It matters not how the factor was informed of the transfer, provided it be shown that he knew that his creditor was divested of all right to the debt so transferred, and that such knowledge was derived from the transferree or his agent.

Where the original owner has lost all power over the property, and the title has legally vested in another, the creditors of the former cannot attach.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

Clarke, for the appellants.

Maybin, for the defendant.

Vason, for the intervenor.

Simon, J. This suit was commenced by attachment. The property upon which it was levied consists in a certain amount proceeding from the sales of 163 bales of cotton, which, having been sold by Franklin & Henderson, the garnishees, left in their hands, after payment of a draft for $5000, drawn upon them by the defendant, and paid sometime previous to the sales, a balance of $938 98, the right to which is claimed by Patton, an intervening party, in whose favor judgment was rendered in the inferior court, from which the plaintiffs have appealed.

The record exhibits the following facts and circumstances: It appears that sometime in the beginning of 1844, the intervenor advanced to the defendant, Morton, at Columbus, Georgia, a sum of money, which was invested by the latter in the purchase of cotton. Morton purchased 163 bales, which were shipped to Preston & M'Clay, of Apalachicola, whence they were reshipped and consigned to the garnishees at New Orleans. On the 7th of March, 1844, the defendant executed to Patton, the intervenor, at Columbus, a receipt for the sum of $7290 80, being "in full for invoice of 163 bales of cotton shipped to Messrs. P. & M. Apalachicola, per steamer Boston, on the 10th of February, and by them reshipped to Messrs. F. & H. New Orleans." And on the same day, he, Morton, drew a bill for $5000, on the garnishees, payable to the order of the intervenor, which was duly paid. On

the same day, a letter and invoice were written by Morton to Franklin & Henderson, giving them notice of the drawing of the bill, which were received with the cotton, the invoice of which is headed in the following words: "Invoice 163 bales shipped by W. S. Morton, per steamer Boston, to Messrs. Preston & M'Clay, Apalachicola, and by them reshipped per schooner Swallow, to Messrs. Franklin & Henderson, New Orleans, to be sold for account and risk of Richard Patton, Esq., and account sales rendered to W. S. Morton." Said cotton was sold about the 1st of April ensuing.

On the 11th of March, Morton drew another bill of exchange, or order, upon the garnishees, in favor of R. Patton, to pay the balance of the proceeds of the cotton, to the order of the latter. This bill was endorsed by Patton to E. G. Casey, his agent, who forwarded it to Corning & Co. of New Orleans, his agents, after having, as such agent, endorsed it over to the order of the latter; and the evidence establishes, that Corning having, prior to the issuing of the attachment, met Franklin, (of the house of Franklin & Henderson,) in the street, he informed him, that he had received an order for the balance of the proceeds of the cotton. Franklin answered, that the cotton was not sold, and no further particulars were given by Corning about the order. It further appears, however, that Corning & Co. who were the bearers of Morton's order, as the agents of Casey or Patton, were also the agents of the plaintiffs, and that by direction of the Bank, they caused the present suit by attachment to be instituted. This attachment was levied on the 2d of April, 1844, subsequently to the conversation between Corning and Franklin in relation to Morton's order in favor of Patton; and we find, in a letter from Corning & Co. to the cashier of the Bank, dated the 4th of April, 1844, that the latter had been previously apprised of the issuing of the attachment. The letter recites: "Morton had given an order for the balance in favor of Casey, but it was not accepted, and, therefore, the attachment, we think, will hold good."

The record further shows, that a letter was written by Casey to Corning & Co. on the 11th of March, 1844, in which the order for the balance was enclosed, with a request that the proceeds of both bills, (including that for $5000,) should be remitted

as soon as possible; and the parol evidence proves, that after the order was given, Martin had no further interest in the cotton; that he exercised no further control or ownership over the same; and that he left for Europe on the 12th of March. The facts of the invoice bill of the cotton having reached the consignees; of the bill for $5000 having been presented in time by L. Corning; of Casey's acting as the agent of the intervenor, and of Corning & Co. being the agents of the plaintiffs in this suit, are also satisfactorily established; and it is perhaps proper, that we should particularly notice the manner in which the order, forwarded by Casey to Corning & Co., and which was in the possession of the latter at the time this suit was instituted, was drawn by the defendant. It is in these words: "Messrs. Franklin & Henderson, New Orleans: Please pay to Richard Patton, Esq., or order, the avails of shipment of 163 bales of cotton, forwarded to your address by Messrs. Preston & M'Clay, of Apalachicola, against which I valued on you, in his favor, at 30 days, on the 7th inst., for $5000. *The cottons are his, and you will please hold them subject to his order only.* WM. S. MORTON."

We are satisfied, that the judgment appealed from is correct. Without its being necessary to inquire into the question of ownership of the cotton, the title to which appears to have been transferred by Morton to the intervenor, not only by the order which is the main basis of the intervention, but also by the receipt and invoice produced in evidence, and which might perhaps, being in good faith, be sufficient to divest Morton of his title to the cotton, and to entitle Patton to claim the proceeds thereof as his; it seems to us, that it suffices that said proceeds were regularly transferred by the former owner of the cotton to the intervenor, for a valuable consideration, before the date of the issuing of the attachment, to give the latter the right of recovering them as against an attaching creditor, provided it is shown, that due notice of the transfer was given to the debtor of said proceeds previous to the levying of the attachment. It is true, the only direct notice of the order proven to have been given to Franklin & Henderson, results from a conversation which took place between Franklin and Corning, sometime previous to the sale of the cotton; but the consignees must have also known from the invoice,

which was in their possession at that time, that the cottons were to be sold for the account of Patton, and that, therefore, the latter was entitled to receive the proceeds thereof; they had already paid him five thousand dollars on the cottons yet unsold, and when Corning apprised Franklin that he, Corning, to whom the $5000 had been paid, as Casey's agent, was the bearer of an order for the balance, the only reason then given for not accepting the order was, that the cotton was not sold. Thus, Franklin knew that there was in the hands of Corning & Co., an outstanding order for, or a transfer of, the balance of the proceeds; he was aware, that had the cotton been sold, such balance should have been paid over to Corning; and as it is obvious, that his refusal to accept the order, because the cotton was not sold, could not destroy the right of the transferree, it is clear, that the knowledge which Franklin had of the existence of the transfer, was sufficient to entitle the intervenor to claim said proceeds, after the sale, and that no attachment at the suit of any of the transferror's creditors, could have been levied upon them. We have often held, that it matters not in what way a debtor is informed of the transfer of his creditor's claim, provided it is shown, that he knew that his said creditor was divested of all his rights to the debt assigned, and that such knowledge of the fact was derived from the transferree or his agent. 5 Mart. N. S. 180. 6 Ib. 286. *Gillett* v. *Landis et al.* 17 La. 470. *Flint et al.* v. *Franklin et al.* 9 Rob. 209. Here, Morton was clearly divested of his rights to the proceeds. Franklin & Henderson, in whose hands those proceeds were, knew it; nay, the plaintiff's agents, who caused the attachment to issue, knew it also. They had the order in their possession, and were charged with its collection; they were fully aware of the extent of the intervenor's rights; they knew that the proceeds were his property, and not Morton's; they could not, with any degree of good faith or fidelity to their trust, do any act which would have the effect of depriving their principal of the rights by him acquired through them, so as to give an undue advantage to themselves or to others; and, under all the circumstances of the case, as disclosed by the evidence, we do not hesitate to conclude, that the attachment was improperly laid upon the amount in controversy. The doctrine so often recog-

nized by this court, that when the owner has lost all power over his property, and when the title to it has become legally vested in another, creditors cannot attach, is properly applicable to the rights of the parties to this cause. 4 Mart. N. S. 667. 2 La. 514. 15 La. 465. 18 Ib. 321, 447. 4 Rob. 517.

This view of the question of notice, precludes the necessity of examining the two bills of exceptions found in the record, as neither of them has any bearing upon the proof adduced to establish it, with regard to the garnishees or debtors of the funds in dispute.

Judgment affirmed.

SUCCESSION OF JEAN MAGER—AGATHÉ ALEXANDRINE COLLARD, Universal Legatee, Appellant.

In determining the compensation to be allowed to an attorney appointed to represent the absent heirs of a succession, the court should not be governed by the opinion of other members of the profession as to the amount. It should exercise its own judgment, and the allowance should be made with reference to the labor, skill, and care required, and to the value of the estate.

An attorney appointed to represent the absent heirs of a succession, is incompetent to act as attorney in procuring the recognition of the heir. Such recognition must be sought contradictorily with him.

APPEAL from the Court of Probates of New Orleans, *Bermudez*, J.

Grima, for the appellant, contended that the amount allowed to the attorney of the absent heirs, was exorbitant, and should be reduced; citing 3 Mart. 363. 6 Ib. 416. 9 Ib. 284.

Blache, pro se.

MARTIN, J. The universal legatee is appellant from a judgment which allows to M. Blache, Esq., the attorney appointed by the court to represent the absent heirs, $1500 for his services as such.

The evidence does not show that these services consisted of anything more than writing letters to the testamentary heirs, announcing the death of the testator; giving a statement of the affairs of the succession; and the professional advice necessary for

their guidance; besides attending to and signing the inventory. The appellee introduced below, three members of the profession, all of whom depose that his claim is a just one. They base their opinion on the large amount going to the absent heirs; the magnitude of the estate; the allowances generally made by the Court of Probates in such cases, and the rate of fees usually paid to attorneys for absent heirs in estates of importance.

The reasoning of the court in the judgment assumes, that it is bound to make that allowance to the attorney for absent heirs, which the professional gentlemen he produces recommend as a fair compensation for his services, without exercising its own judgment thereon. We held a contrary opinion in the cases in 5 Mart. N. S. 402, and in 13 La. 413, and we are not dissatisfied with it. That account must be extravagant indeed, which will not be considered as moderate by two members of the bar, especially those who are in the habit of being appointed by the Probate Judge to represent absent heirs. In the present case, the witnesses do not appear to have paid much attention to the nature and extent of the services rendered. They have considered the forces of the succession only, its *amount*, *magnitude*, and *importance*. Courts of Probates are the protectors of widows, orphans and absentees, and their duty is to prevent estates from being lavished. The labor of an attorney, whether his client be absent or present, ought to be rewarded according to its nature, extent, and the degree of skill and care it demands. The care is certainly increased by the value of the estate, and the number and diversity of the objects composing it. In the correspondence with the absent heirs, the labor of the attorney is nearly the same in all estates. The care which the number and diversity of the objects composing the succession requires, is shown by the inventory, and the number of vacations employed in taking it. In the present case, the labor and care of the appellee in informing the heirs, and attending to the inventory, were manifest. His witnesses do not appear to have given any opinion as to their intrinsic value. They appear to have been satisfied with mentioning the sum which an heir, coming to an estate of the value of that of the testator, ought to be mulcted in.

The succession was as free from debt as any that ever came

before a Court of Probates. There was no debt, and money enough to discharge the expenses and legacies. No suit was brought against it, or for it, except the proceedings necessary to open and close the *mortuaria*.* The appellee, it is true, places among the services rendered by him, a petition which he filed to have the heir recognized. As this recognition was sought contradictorily with him, he cannot charge it among the services rendered to the estate, and he was incompetent to procure it.

Upon the whole, exercising our judgment on the labor, skill, and care, which were required of the appellee, and the value of the estate, which was very large, we have concluded that the sum of $750 only, ought to have been allowed by the First Judge.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, and that the appellee be placed on the *tableau* for the sum of $750, with costs in the court below, and that he pay those of the appeal.†

The State *v.* The Judge of the Court of Probates of New Orleans.

An appeal will lie in favor of the heirs from a judgment on an opposition made by them to a *tableau* of distribution presented by the curator of the succession of the deceased, though none of the claims so opposed and allowed against the estate exceed three hundred dollars, where their whole amount exceeds that sum.

Rule on the Judge of the Court of Probates of New Orleans,

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* It is admitted in the record that the succession, including legacies, and accounts due deceased in France, as shown by accounts current, amounted to $250,000.

† *Blache*, for a re hearing. The amount allowed to the attorney of absent heirs was reasonable Civ. Code, art. 1213. Statute of 10 March, 1845, s. 8. (Acts, p. 56.) The attorney of the absent heirs was not competent to procure the recognition of the heir. Civ. Code, art. 1181. Code of Pract. arts. 1000, 1001, 1002. It is only where an heir presents himself, after the payment of the balance in favor of the estate into the State treasury, and after the curator or executor has been discharged, that the heir must be recognized contradictorily with the attorney of the absent heirs. Civ. Code, art. 1193.

Re-hearing refused.

to show cause why a *mandamus* should not be issued directing him to allow a suspensive appeal from a judgment rendered in the matter of the succession of George Asbridge, deceased.

Greiner, for the rule, cited 11 La. 462; 3 Robinson, 6.

Bermudez, Judge of Probates of New Orleans, showed for cause against the rule, that the amount of the claims of the different creditors, being each less than three hundred dollars, they could not appeal from the judgment rendered; (Const. art. 4, s. 2;) and that, consequently, no appeal would lie from the same judgment against them.

MARTIN, J. To a rule on the Judge to show cause why the heirs of George Asbridge should not have an appeal from a judgment rejecting their opposition to a *tableau*, presented by the curator of the estate of the deceased, he shows for cause, that this court has no jurisdiction of a judgment by which $16 are allowed to Allard & Charbonnet, $75 to McPherson, $250 to Vandalson, $125 to H. R. Grandmont, and $87 55 to Hennen, as neither of these sums exceeds three hundred dollars, although the aggregate be upwards of five hundred.

It is clear that the claim of the heirs against the curator, is for upwards of five hundred dollars. This gives them a right to solicit the assistance of this court, if their claim be reduced or destroyed by improper allowances, whether any, or all of these, be for a sum less than three hundred dollars. 8 La. 164.

The rule must, therefore, be made absolute.

JOHN D. FINK, Dative Testamentary Executor of Sarah Baum, deceased, *v.* WILLIAM H. MARTIN and others.

In an action by an executor against the sureties of a former executor to recover money received by the latter belonging to the succession, defendants cannot plead in compensation a debt due by the deceased to their principal. The debt must be settled in the ordinary course of law, contradictorily with all the parties interested.

APPEAL from the Court of Probates of New Orleans, *Bermudez*, J.

Simon, J. The plaintiff, who sues as dative testamentary executor of the estate of Sarah Baum, and as the successor in office of one Thomas Powell, who formerly acted as such, seeks to recover of the defendants, *in solido*, as the sureties of the said Powell, a certain amount which was received by the latter in his fiduciary capacity, and which he, said Powell, was condemned to pay to the plaintiff by a previous judgment.

William H. Martin, one of the sureties, joined issue, admitting that he signed the bond sued on as one of the sureties of Thomas Powell, but averring that Sarah Baum, at her decease, left no succession; that she was the lawful wife of John Kellar; that said Kellar is indebted to the said Powell; and that, therefore, his said principal in the bond sued on, is not liable for any sum whatever, to the succession which he administered, &c.

Previous to the trial of the suit, Martin having obtained a rule on the plaintiff to show cause why commissions should not issue to examine certain witnesses in the States of Indiana and Kentucky, for the purpose of proving by their testimony that Powell is a creditor of Kellar, that Kellar was the husband of Sarah Baum, and that the latter at her demise left no succession, said rule was discharged; and, on the day of the trial, the defendant having offered to introduce a witness to prove the same facts in support of his defence, this was objected to by the plaintiff's counsel, on the ground, that Martin could not, as one of the sureties of Thomas Powell, set up as a defence that the deceased left no succession. The plaintiff's objections were sustained by the court, *a qua*, which refused to allow the witness to testify, and the defendant took a bill of exceptions, which, by agreement of counsel, is also to apply to the refusal of the court to permit commissions to issue.

Judgment was finally rendered below against Martin for the amount due by Powell, as executor; and, after an unsuccessful attempt to obtain a new trial, based mainly upon the ground that the refusal of the Judge to allow time to the defendant to procure the testimony of his material witnesses residing out of the State, and to permit him to examine a witness on the trial to prove the facts alleged in his answer is erroneous, the defendant, Martin appealed.

The only question which has been insisted on by the appellant's counsel in his argument before us, grows out of his attempt to introduce below certain parol evidence by which he intended to sustain his defence; and it has been strenuously urged, that as compensation is one of the modes of extinguishing an obligation, and takes place by the mere operation of law, even when its existence is unknown to the debtor, the defendant in this case can oppose it, being one of those exceptions belonging to principal debtors, and which are inherent to the debt.

If we understand the object of the evidence offered and intended to be procured, it was for the purpose of establishing that Sarah Baum was a married woman at the time of her death; that John Kellar was her husband; that the property she possessed belonged to the community of *acquests* and gains formerly existing between said John Kellar and his deceased wife; that therefore, she had no estate of her own, but only one in community, and that John Kellar being the head or master of the said community, the debt by him due to Powell should be compensated with the amount which the latter owes to the said community, as proceeding from his administration, as executor, of the estate of Sarah Baum, which, in fact, belongs to her surviving husband. To this it has been answered, that Powell himself made no such defence; that, if he had, he could not have been allowed to gainsay or deny that there is an estate of Sarah Baum, from the recital in his bond; that, even supposing that the funds sued for belong to the community that may have existed between Kellar and the deceased, the rights of Powell, as a creditor of the said community, must be settled contradictorily with all the creditors thereof, to wit, by an account filed by the executor; and that Powell has no right to keep those funds in his possession, to apply them to the satisfaction of his claim by compensation, and must transfer them to his successor that the rights of all may be settled.

We think the Judge, *a quo*, did not err. Whether the amount sued for belonged to the succession of Sarah Baum, or to the community said to have existed between her and John Kellar, is, in our opinion, immaterial. Thomas Powell received it as executor, and as such he was called upon to settle his account and

to reimburse the sums received. He may have been a creditor of John Kellar previous to the death of the latter's wife; and if it be true, that they were legally married, (a fact which was established in the case of *Baum's Succession;* 11 Rob. 314,) and that therefore, there was a community between them, he may perhaps be entitled to claim his payment out of the effects and moneys belonging to what was considered at the time the bond was taken, to be the estate of Sarah Baum; but the amount sued for came into Powell's hands *as executor, and after the dissolution of the community*, and although it may belong to the said community, it is perfectly clear to our minds that Powell cannot pretend to compensate the claim which he has against it, with the funds which he has in his hands in his fiduciary character. When an estate is administered, either by an executor, administrator or curator, it presupposes the existence of debts, and consequently of creditors, or at all events that it should be accounted for in due course of administration. If so, how could the executor be allowed to plead compensation of the funds which he is called on to account for in his fiduciary capacity, with the claim he may have to set up against the estate which he administers? The estate which may be insolvent, must be settled in the ordinary course of law contradictorily with all the parties therein interested, whether it is one in community or not; the executor or administrator must bring the funds before the court which has jurisdiction over them, in order that they may be disposed of or decided according to the rights of the parties; he must render his account, and file a *tableau;* and it will be time enough when such *tableau* is filed, and made subject to the homologation of the court, for the former executor or his sureties to appear and set up the claim, for the satisfaction of which they now attempt to keep the funds which they are bound to account for, as a consequence of Powell's appointment and administration as executor. If those funds really belong to the community alleged to have existed between the deceased and Kellar, who is not a party to this action, the appellant will still be at liberty to claim his share of them, contradictorily with the surviving husband and the other creditors; but he must first account and pay over to his successor in office, what he owes as executor, and he has no right

The only question which has been insisted on by the appellant's counsel in his argument before us, grows out of his attempt to introduce below certain parol evidence by which he intended to sustain his defence; and it has been strenuously urged, that as compensation is one of the modes of extinguishing an obligation, and takes place by the mere operation of law, even when its existence is unknown to the debtor, the defendant in this case can oppose it, being one of those exceptions belonging to principal debtors, and which are inherent to the debt.

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We think the Judge, *a quo*, did not err. Whether the amount sued for belonged to the succession of Sarah Baum, or to the community said to have existed between her and John Kellar, is, in our opinion, immaterial. Thomas Powell received it as executor, and as such he was called upon to settle his account and

to reimburse the sums received. He may have been a creditor of John Kellar previous to the death of the latter's wife; and if it be true, that they were legally married, (a fact which was established in the case of *Baum's Succession;* 11 Rob. 314,) and that therefore, there was a community between them, he may perhaps be entitled to claim his payment out of the effects and moneys belonging to what was considered at the time the bond was taken, to be the estate of Sarah Baum; but the amount sued for came into Powell's hands *as executor, and after the dissolution of the community*, and although it may belong to the said community, it is perfectly clear to our minds that Powell cannot pretend to compensate the claim which he has against it, with the funds which he has in his hands in his fiduciary character. When an estate is administered, either by an executor, administrator or curator, it presupposes the existence of debts, and consequently of creditors, or at all events that it should be accounted for in due course of administration. If so, how could the executor be allowed to plead compensation of the funds which he is called on to account for in his fiduciary capacity, with the claim he may have to set up against the estate which he administers? The estate which may be insolvent, must be settled in the ordinary course of law contradictorily with all the parties therein interested, whether it is one in community or not; the executor or administrator must bring the funds before the court which has jurisdiction over them, in order that they may be disposed of or decided according to the rights of the parties; he must render his account, and file a *tableau;* and it will be time enough when such *tableau* is filed, and made subject to the homologation of the court, for the former executor or his sureties to appear and set up the claim, for the satisfaction of which they now attempt to keep the funds which they are bound to account for, as a consequence of Powell's appointment and administration as executor. If those funds really belong to the community alleged to have existed between the deceased and Kellar, who is not a party to this action, the appellant will still be at liberty to claim his share of them, contradictorily with the surviving husband and the other creditors; but he must first account and pay over to his successor in office, what he owes as executor, and he has no right

to plead compensation. This doctrine is fully developed and commented on by Toullier, vol. 7, No. 380, 381, who says: "*Mais la compensation n'est point admise en faveur de celui qui, étant créancier ou débiteur du failli,* (or of a succession which is in due course of administration, or subject to the rights of opposing creditors,) *avant l'ouverture de la fallite,* (or of the succession) *est devenu depuis son débiteur ou son créancier, de quelque manière que ce soit.*"

We conclude therefore, that in the absence of John Kellar, who is not a party to this suit, and of the creditors of the succession of Sarah Baum, or of the alleged community said to have existed between her and said Kellar, the Judge, *a quo*, decided correctly in considering the facts sought to be established, as foreign to the real merits of the controversy. But although the appellant's plea of compensation is here disregarded and rejected, we think that his right to set up and liquidate his claim against the community to which he pretends that the amount sued for belongs, should be reserved for further adjustment contradictorily with all the parties that may be therein interested, to be paid out of the funds in the plaintiff's hands in due course of law, in case it can be shown hereafter, that those funds, though originally considered as belonging to the succession of Sarah Baum, really belong to said community.

It is, therefore, ordered and decreed, that the judgment of the Court of Probates be affirmed, with costs; without prejudice to the reservation made above in favor of the appellant, and to his right to exercise his principal's claims against the estate in community between John Kellar and his deceased wife, if any such community can be established, at any time hereafter, and after said appellant shall have satisfied the judgment appealed from.

Hoffman, for the plaintiffs.

McHenry and *Roselius*, for the appellant.

DAVID BARBOUR and another *v.* J. L. H. SMITH.

Where testimony taken on the trial below was not reduced to writing, and there is no statement of facts nor assignment of error, the appeal must be dismissed.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

MORPHY, J. The plaintiffs, who sue upon an open account, obtained orders of arrest and attachment, on their affidavit that their debtor was about to depart permanently from the State, without having in it sufficient property to satisfy their claim. The latter took a rule on them, to show cause why those orders should not be set aside, on the ground that he was a resident and a citizen of Louisiana, and had no intention of leaving the State. The rule was made absolute, and they appealed.

Several witnesses appear to have been examined on the trial of the rule, but their testimony was not reduced to writing, and no errors have been assigned, nor any statement of facts made out. The appellants not having put it in our power to grant them the relief they pray for, their appeal must be, and is hereby dismissed, with costs.

Howard, for the appellants.

Elwyn, for the defendant.

JAMES GARLAND *v.* CHARLES HOLMES.

A suspensive appeal may be taken within ten days from the day on which judgment was signed, exclusive of Sundays and days of public rest; and in computing the time neither the day on which the judgment was signed, nor that on which the appeal is to be taken, are included. C. P. 318.

The first of January is a day of public rest in this State. Act 7th March, 1838, s. 5.

Where the last day allowed for obtaining an appeal falls on a day of public rest, the whole of the next judicial day is allowed.

RULE on the Judge of the Commercial Court of New Orleans, to show cause why a *mandamus* should not be issued, commanding him to allow a *fi. fa.* to be taken out by the plaintiff, Garland, on a judgment recovered against the defendant, Holmes.

Van Matre, for the plaintiff in the rule.

Watts, Judge of the Commercial Court, showed cause against the rule.

MORPHY, J. A *mandamus* is prayed for in this case, directed to the Judge of the Commercial Court of New Orleans, commanding him to allow the petitioner to take out a writ of *fieri facias*, under a judgment rendered in his favor, and signed on the 20th of December, 1845. It is alleged that, on the 2d of January, 1846, the eleventh day after said judgment was signed, (Sundays being excluded,) the defendant applied for, and obtained a suspensive appeal, returnable on the first Monday of February next; that this appeal having been granted after the legal delay had expired, within which a suspensive appeal could be allowed, was illegally and wrongfully granted, and should not stay the execution of said judgment; notwithstanding all which, the Judge refuses leave to the applicant to issue a writ of *fieri facias*, on the same. In answer to the rule, the Judge says, that deducting two Sundays that intervened, the ten days allowed by law for a suspensive appeal expired on the first day of January, 1846, and that in all cases where the last day of the time allowed for the performance of any judicial act, falls upon a *dies non juridicus*, his construction of the law, and the practice of his court, has always been to allow the whole of the next day, for the performance of such act; as, without this allowance of time, the party would not have the delay intended to be granted to him by law. The reason given by the Judge is satisfactory, and was the basis of the decision of this court in *Allen & Deblin* v. *Their Creditors*, 8 La. 223. It is true, that in that case, the last day on which an opposition could be filed was a Sunday; but, by an act of the General Assembly, approved on the 7th of March, 1838, (Acts, p. 44,) the first of January was declared to be a day of public rest in this State, and was added to those days mentioned in the Code of Practice, on which no judicial proceeding can be had. The course pursued by the Judge, was moreover justified by article 318 of the same Code, which provides, "that, in all cases where delay is given, either to do something or to answer, neither the day of serving the notice, nor that on which the act is to be

done, or the answer filed, are included. The exceptions to this rule are specially provided by law."

Rule discharged.

HORACE C. CAMMACK, Syndic of the Creditors of Hugo C. Gildermeester, an Insolvent, *v.* ——— PRIESTLY and others.

Where a creditor receives from his debtor a draft on a third person, as collateral security, the proceeds to be applied to the payment of his debt, he acts, so long as he holds the draft, as the agent of his debtor, and is responsible not only for unfaithfulness, but for faults or neglect; (C. C. 2971, 2972;) and where, through the neglect of the creditor, in giving incorrect instructions to the notary by whom the draft was protested, or in not furnishing him with the means of obtaining correct information as to the residence of the endorser, the latter, the only solvent party to the bill, is discharged, the debtor will be entitled to credit for the amount of the bill.

Where the holder of a note, with whom a draft had been deposited by the debtor, as collateral security, becomes liable to the latter for the amount in consequence of his neglect to protest the draft, the damages sustained by the creditor may be pleaded in reconvention to an action on the note by the holder (C. P. 375,) or by the syndic of his creditors, where the holder had become liable by his neglect to protest the draft before his declared insolvency.

It is not necessary that a demand pleaded in reconvention should, in all cases, be liquidated.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

Rawle, for the appellant, cited 7 Mart. N. S. 238, 516; *Fagot* v. *Porche*, 7 La. 562; *Blanchard* v. *Cole*, 8 La. 158; *Jonau* v. *Ferrand*, 3 Rob. 365; *Low* v. *Thomas*, 4 Rob. 183.

Wray, for the defendants. The plea in reconvention should be maintained. Code of Pract. art. 375; 10 La. 186; 18 La. 553; 6 Mart. N. S. 671; 7 Mart. N. S. 290, 291. The right to plead in reconvention was not affected by the insolvency of Gildermeester. 1 Mart. N. S. 483.

SIMON, J. The plaintiff, who sues as the syndic of Gildermeester & Co., seeks to recover the amount of two promissory notes, drawn and subscribed by the defendants Priestly & Bein, to the order of their co-defendant Richardson, and duly protested at maturity.

The defence sets up, that the notes sued on, were given to the insolvents by Priestly & Bien in the course of commercial transactions, and that when the same fell due, to wit, in December, 1842, and January, 1843, the drawers being unable to pay them, offered to Gildermeester & Co., certain notes and drafts which were received by the latter as collateral security for the payment of the notes. That among them there was a draft of $813 70, drawn by Bisland & Shields on John C. Harrison, and by him accepted, dated on the 12th January, 1842, and payable at twelve months to the order of Shields, and by him endorsed. That the insolvents, by taking said draft as collateral security, bound themselves to have it duly protested in case of non-payment. That said draft was protested at maturity, when, under the instructions of said insolvents, notice thereof was sent to Bisland & Shields, the drawers, to the parish of Lafourche Interior. That, on the 20th of January, 1843, a suit was instituted by Gildermeester & Co., in the name of Priestly & Bein against the drawers of the draft, the proceeds thereof to go to the credit of the notes sued on; that by a judgment of the Supreme Court, Bisland, one of the drawers of said draft, and the solvent partner of the concern of Bisland & Shields, was released on the ground of insufficiency of the notice. That Priestly & Bein's recourse upon Bisland, was lost by the negligence of the insolvents in giving incorrect instructions to their notary. That said insolvents, under the circumstances, have made said draft their own, and have become liable to the defendants for the amount thereof, with interest and costs; and that the defendants are entitled to plead the amount of said draft, and the interest and costs, in reconvention against the plaintiff's demand, &c.

The Judge, *a quo*, gave effect to this defence, admitted the reconvention, and gave judgment in favor of the plaintiff, for the balance due after allowing the amount of the draft, with interest and costs, as a further credit on the notes sued on; from which judgment, the plaintiff, being dissatisfied therewith, took this appeal.

The evidence found in the record, discloses the following facts: Bisland & Shields' draft on John C. Harrison, accepted by the latter, for $813 70, was delivered by the defendants, Priestly

& Bein, to Gildermeester & Co., as collateral security for these notes sued on; the acceptance bore the date of the 12th of January, 1842, and was payable one year after date. When said draft became due, the same was protested, and notice sent to the drawers by the notary, directed to the parish of Lafourche Interior; this was done according to the directions given to the notary by Gildermeester & Co., and it is shown, that said notary had no information from any other source, than from Gildermeester. The testimony proves, that the Houma post office in the parish of Terrebonne, is the nearest to the residence of Bisland & Shields; that the Thibodeauxville post office in Lafourche Interior, is sixteen miles further from the plantation of the drawers, than the Houma office, which is only three miles distant from said plantation; that Gildermeester never applied to Harrison, the acceptor, nor to Bein, for directions as to the residence of said drawers: that the draft was put in the hands of a lawyer to be sued on against Bisland, and to be accounted for to Gildermeester for the amount, which might be eventually recovered; and that a judgment having been rendered thereon, against Bisland in the District Court, the same was reversed in the Supreme Court on appeal, and the suit was dismissed as to the said draft in favor of Bisland. See 9 Robinson, 426.

It is further established by Harrison's deposition, as a witness, that, after the draft was accepted, he received Bisland & Shield's crop, which amounted to more than sufficient to pay it; and the other testimony proves that Bisland is the only party to the draft, able to pay the amount thereof.

It is also admitted that Gildermeester filed his *bilan*, in June, 1843.

We think the judgment complained of is correct. When Gildermeester took the draft in question in his possession as collateral security for the debt due him by Priestly & Bein, who had accordingly consented that the proceeds thereof, when collected, should be credited on the notes sued on, there arose necessarily on the part of the creditor, the obligation of preserving the rights of his debtors on the draft, so as to enable them to enforce its payment from all and every one of the parties thereto. The contract, if not precisely one of pledge, as urged by the appellees' counsel,

was at least, and perhaps more properly, in the nature of one of agency; that is to say, one from which the creditor, who had undertaken to make the collection of a debt due to his debtors, and therefore, to take all necessary steps to preserve their rights unimpaired, became bound to use the same exertions in obtaining the object for which the draft had been placed in his hands, as the debtors themselves would have done, and to use such diligence as would secure its ultimate recovery, not only for the purpose of obtaining satisfaction, *pro tanto*, of the debt which the draft was intended to secure, but also for the benefit of the party to whom the claim belonged. Priestly & Bein then may be fairly considered, in a transaction of this kind, as principals, and Gildermeester as their agent; he had the draft in his possession, and it was his duty to discharge his trust, as long as he continued to hold the draft, or become responsible to his principals for the damages which might result from its non-performance, (Civ. Code, art. 2971,) being even responsible not only for unfaithfulness in his management of the business, but also for his fault or neglect. Civ. Code, art. 2972. He was authorized to prosecute the collection of the draft; it was delivered to him for that purpose, as collateral security; the proceeds thereof, when collected, were to be applied to the extinguishment of the notes sued on; said proceeds were to be accounted for to him accordingly, by the attorney who had been charged to institute a suit against Bisland in the names of Priestly & Bein, and owing to the insufficiency of the notice to Bisland, the latter was discharged, and it is shown he was the only solvent party to the bill. The evidence satisfies us, that Bisland's discharge was occasioned by the agent's neglect in not ascertaining, at the time of the maturity of the draft, the exact residence of the drawers; in giving incorrect instructions to the notary, and in not furnishing said notary with the means of obtaing proper directions from Priestly or Bein, or from any other person well acquainted with the residence of those to whom the notices were to be sent. The paper was not originally bad; it was good as to Bisland, but it became bad and worthless through the negligence of the agent or creditor who had undertaken to collect it, for the purposes intended between himself and his debtors, for whose benefit the collection was to be

made; and we are of opinion, under such circumstances, Gildermeester has made the draft his own, and is responsible for its amount.

The main question, however, which this cause presents is, whether the defendants are entitled to plead the loss which they have sustained from the negligence of the insolvent, as a reconventional demand against the claim set up in this suit by the syndic? On this point, it has been insisted by the appellant's counsel, that a claim for damages cannot be pleaded in compensation or in reconvention in any case, and that such a claim cannot be pleaded against the syndic of an insolvent estate; that it should be settled with others on the *tableau;* as, if it were not so, one creditor would obtain an advantage over the others.

The appellees' claim to the amount of the draft with interest and costs, as damages, is not pleaded in compensation, but is simply opposed by way of reconvention. It is clearly reconventional, because it grows out of the original transaction, and is so closely connected with it, that had the draft been collected, its amount would have gone to the extinguishment, *pro tanto*, of the notes sued on. If, on the one hand, the appellees were bound to perform their obligation, by paying the amount of said notes; on the other, their creditor who had taken the draft as collateral security, had become obligated to act in such manner as to procure them the benefit of the credit, for which said draft, in the hands of Gildermeester to whom it had been delivered, was intended by both parties. The draft was destined to be used, after collection, as a credit against the notes, was put in the possession of the creditor, in consequence of the existence of said notes, and may be properly the basis of a reconventional demand against them. Code of Pract. art. 375. We have held, that when the debt claimed by the plaintiff, and the damages sought for in the defendant's answer, arise from one and the same transaction, the latter claim is a fair and legal demand, which may be pleaded in reconvention; and that although demands are different, but have the same origin, and are intimately connected, being the consequence of the same transaction, the defendant may reconvene against the plaintiff for damages in his answer, in the same suit; (10 La. 185;) and that it is not necessary that a demand set up by way

of reconvention, should always be liquidated. *Bayne* v. *Fox*, 18 La. 82, and the authorities therein cited.

With regard to the objection, that the appellees' reconventional claim cannot be opposed to the demand of the syndic of an insolvent estate, it would be good, if the reconventional rights had been acquired after the declared insolvency; for then, as Toullier says, vol. 7, No. 381, it would prejudice the acquired rights of the other creditors; but here, the act or negligence from which this claim originated, took place in January, 1843, about six months before the failure of Gildermeester, and it is from that time that the responsibility of the latter necessarily attached; the right of the appellees was then acquired, as it resulted from the fact of the drafts having been improperly protested, and of Bisland's having then been released from his liability as one of the drawers thereof, through the fault or neglect of Gildermeester who became subsequently insolvent. "*La compensation*," says Toullier, *loco citato*, (and, *a fortiori*, the *reconvention*,) "*opéreé, même à son insu, en faveur de celui qui est en même tems créancier et débiteur du failli, conserve tout son effet après la faillite*;" and so it was held by this court, in the case of *Bossier's Syndic* v. *Belaire et al.* 1 Mart. N. S. 483. See also the case of *Fink, Executor*, v. *Martin et al. ante*, p. 416.

Judgment affirmed.

GEORGE WASHINGTON CAMPBELL and another *v.* JOHN NICHOLSON and another.

In questions as to the individual liability of persons acting avowedly as agents, the principal inquiry must be to whom was the credit given according to the understanding of both parties; and this is to be ascertained by an examination of the contract itself, the circumstances under which it was made, and the manner in which it had been executed and appears to have been understood, by the parties.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

The plaintiffs allege, that the defendants, Nicholson and Gardiner, are indebted to them in the sum of $802 50, with legal in-

terest from the 1st of January, 1842, for this: That plaintiffs being the proprietors of an infirmary in the city of New Orleans, known as the "Circus Street Infirmary," erected for the reception and treatment of the sick, entered into a contract, on the 28th of August, 1841, with Nicholson & Gardiner, for the reception and treatment of such patients as might be sent to their infirmary by the defendants or others, under said contract, on the conditions and terms therein specified. Plaintiffs allege, that in pursuance of that contract, Nicholson & Gardiner became, and are still indebted to them in the amount sued for. They aver an amicable demand, and refusal to pay, and pray for judgment, and for general relief, &c. The agreement and account sued on, are annexed to the petition, and prayed to be taken as parts thereof.

The agreement is in these words:

"THIS AGREEMENT, entered into by and between Charles Gardiner, Peter Rapp, and John Nicholson, a committee appointed for this purpose by the New Orleans Samaritan Society of the one part, and G. W. Campbell and J. Munro Mackie, physicians, of the other part, witnesseth: that for and in consideration of the sum of one dollar and twenty-five cents, *per diem*, to be paid, or secured to be paid, to the party of the second part, for each and every patient placed under their charge by this arrangement, they, the said doctors Campbell and Mackie, undertake and oblige themselves to receive all the patients that may be sent for admission into their infirmary, by said society, and to extend to the same every medical treatment, and to supply and furnish all medicaments and nurses, requisite for the faithful attention to the sick thus entrusted to their care; and that they shall have provided, exclusively for the reception of the Samaritan patients, a sufficient department in their infirmary, properly provided, in every respect for the comfort of the sick, to be called the "Samaritan Ward," which at all times shall be subject to the inspection of any committee appointed for that purpose; and further, that this arrangement shall continue and be in force for, and during the period of three years from date, under the condition that a full and faithful compliance with the duties incumbent on the respective contracting parties, be strictly adhered to; otherwise to

cease, and be annulled, on either party giving ten days notice thereof.

Witness our hands, this 28th day of August, A. D., 1841, at New Orleans.

CHS. GARDINER,
JOHN NICHOLSON,
G. W. CAMPBELL,
J. MONRO MACKIE."

Witness, J. RITSON, Jr."

The account is as follows:

"*New Orleans, Jan. 1st*, 1842.

SAMARITAN SOCIETY,

To CAMPBELL & MACKIE, *Dr.*

For 992 days medical treatment, in the Circus Street Infirmary, of 102 patients between 28th of August and 12th of December, 1841, at $1 25,	$1240 00
To sundry extras for said patients, according to bills rendered, ...	124 00
To sundry medicines furnished in 1841, according to bill rendered, ...	8 50
	$1372 50
1842. July 2d, by cash paid on account, .	120 00
To balance due, ...	$1252 50
By amount due to Sam. Soc'y, by Dr. Mackie, for rent, ...	450 00
	$802 50"

The defendants denied that they were in any manner indebted to plaintiffs, or to either of them. They admitted that they entered into the contract annexed to the petition, but averred "that they were acting merely as agents for the corporation established by law, known as the Samaritan Society." They denied all the other allegations of the petition, and prayed, that plaintiffs' demand might be rejected, with costs.

There was no contest as to the correctness of the account. A minute book of the proceedings of the society, in the hand-writing

of one Waters, their secretary, was offered in evidence by the plaintiff, from which it appeared that at the date of the contract sued on, the society was unincorporated, having refused to accept the charter accorded to them by the act of 1840. Waters, who was examined as a witness on behalf of the defendants, testified, "that he was a member of the Samaritan Society; that there were about sixty members; that its objects were charitable and benevolent." On cross-examination, he stated the reasons why the charter had not been accepted; "that it was understood by the members who acted on committees, that they were not personally liable; that he never could make an exact roll of the members, because they are spread all over town; that the old members signed the original constitution, but that other members were admitted, who never signed it; and that there are about forty names signed to the constitution."

There was a judgment below, against each of the defendants for one-half of the amount claimed, with interest from judicial demand. The defendants appealed.

Robinson, for the plaintiffs.

H. D. and *A. N. Ogden*, for the appellants. The defendants are not bound, not having exceeded their authority, nor having bound themselves personally. 13 Johns. 311. The capacity of agents, in which defendants acted, sufficiently appeared. 6 Conn. 464. 7 Mass. 14. 2 Fairf. 267. 8 Pick. 56. The credit was given to the principals, the society, who were named. Paley on Agency, 289. 2 Kent, 629, 632. Story on Agency, 288. The account sued on is made out in the name of the Samaritan Society. The society is an unincorporated body, the members of which are partners. They are bound jointly, and all must be made parties to the suit. 3 Rob. 28. 16 La. 119. 8 La. 523. Civ. Code, art. 2080. It is enough for the defendants to show that all are not parties. 5 La. 121. There was no obligation on defendants, under the pleadings, to give up the names of the joint obligors.

Morphy, J. The petitioners, proprietors of the Circus street Infirmary in this city, seek to recover of the defendants $802 50. They allege, that, on the 28th of August, 1841, they entered into a contract with the said Nicholson and Gardiner for the reception and treatment of such patients as might be sent to their

infirmary by the said defendants, or others, in pursuance of the agreement, on the terms and conditions therein specified. That under this agreement, the said Nicholson and Gardiner became indebted to them in a large amount, and that they are still so indebted in the sum claimed. They annex to their petition their contract with the defendants, and an open account, both which documents they pray to be taken as a part thereof. The defendants denied their indebtedness to the plaintiffs, admitted that they had entered into the contract attached to their petition, but averred that, in making it, they acted merely as the agents of the corporation known as the New Orleans Samaritan Society. There was a judgment below against them, and they appealed.

In the written agreement entered into between the parties, the defendants, as a committee appointed for the purpose by the New Orleans Samaritan Society, contracted with the plaintiffs. For and in consideration of $1 25, *per diem*, to be paid to the plaintiffs, the latter obliged themselves to receive all the patients that might be sent to their infirmary by the said society, to give them proper medical treatment, to provide a sufficient department in their infirmary for the reception of these patients, to be called "The Samaritan Ward," which at all times shonld be subject to the inspection of any committee appointed for the purpose, &c., and the account sued on is made out against the Samaritan Society. Thus, by these documents, which we must consider as a part of the petition, it appears, that the defendants acted as agents, gave the name of their principal, and were understood by the plaintiffs as having acted in that capacity. It is not alleged that they engaged personally to pay for the patients sent to the plaintiffs' infirmary, that they contracted without authority, or exceeded that which they had; nor that they acted for a non-existing principal against whom no resort could be had; nor is there any other document tending to show that these defendants, either expressly or impliedly, made themselves personally liable, although they acted as agents. Under these pleadings, which show no right of action against the defendants personally, no evidence was, perhaps, strictly admissible to establish such personal liability. No objection, however, having been made, evidence was admitted to show that, at the time the contract was entered into, the

society or association for which the defendants acted, had no legal existence as a corporation, and that its members were unknown. From this evidence it appears, that some time in 1840, or before, several benevolent persons associated themselves together for the purpose of extending relief to the indigent during the prevalence of epidemics, in this city, and were incorporated under the name they had assumed, of "The Samaritan Society of New Orleans." Being dissatisfied with the charter then given to them, the members of the Society, at a meeting held on the 12th of August, 1841, resolved to continue under their original constitution, until the necessary amendments to their charter could be obtained. These were made by a supplementary act, passed on the 8th of February, 1842, from which time it is believed that the society has acted under its charter. A witness says, that the society is composed of about sixty members, supposed to reside in the city; that forty have signed the constitution; but that the new members never signed it, and that no exact list or roll of the members has been made out. It is urged that, as the defendants acted for a corporation which had no legal existence, and they have not made known the names of the persons composing it, they must be personally liable, because no resort can be had against their principal. The defendants being sued in their individual capacity, it was useless and unnecessary for them to give the names of the members of the Samaritan Society. Had they been sought to be made liable, as members of it, they would have had to name the other members, in order to be made responsible only for their proportion of the debt. Although not incorporated at the date of the contract sued upon, the Samaritan Society existed, and was well known to exist; it could acquire and possess property, make contracts, &c., in the manner pointed out by the Civil Code, art. 437. It cannot, therefore, be said to be an unknown principal, against whom no resort can be had, however difficult and troublesome that resort may be. Whenever a question arises, as to the individual liability of persons acting avowedly as agents for others, the great inquiry must be, to whom was the credit knowingly given, according to the understanding of both parties. Story on Agency, § 288. This can be properly ascertained, only by an examination of the contract itself, of the

circumstances under which it was made, and the manner in which it was carried out by the parties, and appears to have been understood, between them. There is nothing in the writt n agreement from which it can be inferred, that the plaintiffs looked to the defendants, personally, for remuneration. The existence of the Samaritan Society, was notorious, and to none better known than to the plaintiffs. From the minutes of the proceedings of the society, which they themselves gave in evidence, it appears, that the plaintiffs had already had dealings with that association, and had made a settlement with it for a previous account, shortly before the date of the contract sued on.* It is then but reasonable to suppose, that when they were soon after called upon by a committee of the same society, to make a contract for the patients it might send to their infirmary, the plaintiffs looked to the society itself for remuneration, and not to those who held themselves out only as its temporary agents. They accordingly debited the Samaritan Society, and made out against it the account upon which they now sue. In this account we find two credits given to the society; one for $120, paid to the plaintiffs in cash, on the 2d of July, 1842, after its final incorporation; and a further credit of $450, which is stated to be an amount due to the Samaritan Society, by Dr. Mackie for rent. Thus it appears, that while the society was sending patients to the infirmary, under the contract made through its committee, Dr. Mackie, one of the plaintiffs tenanted property from it, and accordingly deducts the debt he owes, from that due by the society under the contract. How then can it be pretended, that the defendants must be personally liable, because they acted for an unknown principal, to whom the plaintiffs did not look, and against whom they can have no recourse. The doctrine that a person contracting as agent, is nevertheless personally bound, where there is no principal to whom resort can be had, proceeds upon the pre-

* The entry in the minutes, to which the court refers, is in these words; under the date of—

"Mr. Nicholson reported verbally, that a settlement has been made by him for the amount due Dr. G. W. Campbell, partly in cash, and partly by an order on Dr. J. M. Mackie, which Dr. Campbell has consented to receive."

sumption, that he who is able to contract, and does contract in his own name, although he is agent for another who is incapable of contracting, intends to bind himself, otherwise the contract would be without any validity. Story's Agency, § 280, 281. No such presumption exists in the present case, as the association, whose agents the defendants were, was capable of contracting, and did contract more than once with the plaintiffs themselves. From the acts of the latter, and the evidence in the case, we are satisfied, that credit was given to the members of the Samaritan Society, and not to the defendants.

It is, therefore, ordered and decreed, that the judgment of the Commercial Court be reversed, and that ours be for the defendants as in case of nonsuit; the costs to be paid by the appellees in both courts.

SAME CASE—APPLICATION FOR A RE-HEARING.

Robinson, for a re-hearing. The question to whom the credit was given, must be decided by the written contract of the parties, where one exists. Such a contract as the one sued on, with such words of description in the body of the instrument, but signed in the individual names of the parties, is their individual contract—not their contract as agents. There is no case on this point in the Reports of this State; but the New York, Massachusetts, and English decisions are conclusive.

In *Taft* v. *Brewster et al.* (9 Johns. 334,) the defendants were sued on a bond in which, "by the name and description of Jacob Brewster, Thaddeus Loomis and Joseph Coats, *trustees of the Baptist Society of the town of Richfield*," they acknowledged themselves to be bound, &c. The bond was signed, "Jacob Brewster, Thaddeus Loomis, and Joseph Coats, *Trustees of the Baptist Society of the town of Richfield*." On demurrer by defendants, that the bond was executed by them in a *corporate*, and not in their *individual* capacity, the court decided: "That the bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist Church; and if the defendants are not bound, the church certainly is not, for the church has not contracted either in its corporate name, or by its seal. The addition of *trustees* to the names of the defendants is, in this case, a mere *descriptio personarum*."

White et al. v. *Skinner*, (13 Johns. 307,) was an action against Skinner, individually, on a contract purporting to have been made between the plaintiffs, Skinner, and two others, as directors of the Granville Cotton Manufacturing Company; but the contract was signed and sealed by Skinner alone, as follows: "For the Directors, Reuben Skinner, [L. S.]" Skinner pleaded that the agreement was executed by him as a director and agent for the company, of which plaintiffs had notice. On demurrer, the court said: "The defendant represented himself, and assumed to act, as the agent of the directors of the Manufacturing Company. He is now sued in his private, individual capacity; and to exonerate himself, he was bound to aver, and prove, that he had authority to seal for his co-directors. The covenant is not to be regarded as a nullity. The plaintiff relied on this specialty security. If it does not bind the directors, for whom the defendant represented himself as agent, then it is personally obligatory on the defendant alone; and it is *incumbent on the defendant*, not on the plaintiffs, to aver and prove the authorization, if any, by which the defendant contracted for the company; he has no right to call on the plaintiffs to prove either the affirmative or the negative." Judgment for plaintiffs.

The case of *Stone* v. *Wood*, (7 Cowen, 453,) was an action on a charter party of affreightment, which recited that it was made "between Captain G. P. Stone, part owner of the good ketch George, whereof G. P. Stone is master, on the one part, and Timo. N. Wood, *as agent* of J. & R. Raymond," &c. The instrument was signed:

"TIMO. N. WOOD, [L. S.]
"G. P. STONE, [L. S.]"

This case was decided on a demurrer. The court, *per* Savage, Ch. J., say: "The question is whether the defendant is liable personally on this contract. That J. & R. Raymond are not liable on the contract, there can be no doubt. When an agent, or attorney contracts on behalf of his principal, he must do so *in the name of the principal*, or the latter is not bound. *Combe's case*, 9 Coke, 76–7. When any one has authority to do an act, it should be done *in the name of him who gives the authority*, not in the name of the attorney. All the subsequent cases agree in the law as thus laid down by Coke. There is no contradiction on the subject. The contract, then, not being with the Raymonds, is it obligatory on the defendant, or is it merely void? The defendant describes himself as agent of J. & R. Raymond. Had the contract been in the name of the Raymonds, and by their authority, it would have been their contract; and there

would have been no liability upon the agent. But the agent, to excuse himself, should show a liability upon his principal; a doctrine which has been often recognized by this court. 13 Johns. 66. 19 Ib. 63. 1 Cowen, 536. A leading case on this subject is *White* v. *Skinner*, 13 Johns. 307. *Whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself, and no other person.* 11 Mass. 29. The words, *as agent*, do not constitute the defendant the agent of the Raymonds. At most, *they are mere description.*" Judgment for the plaintiff.

In *Hills* v. *Bannister et al.* (8 Cowen, 31,) the action was on a joint and several promissory note payable to plaintiff, signed by the defendants, with the addition, "Trustees of Union Religious Society, Phelps." The defendants proved the society to be a corporation, and objected that the plaintiff had no right to recover against the defendants, they having signed as agents for the society. The court say: "The objection that the defendants were not liable upon the note, having signed in the character of trustees, was properly overruled. The addition of trustees, &c., is a mere *descriptio personarum.*"

Barker v. *The Mechanic Fire Insurance Company*, (3 Wendell, 94,) was an action on a note; and on demurrer that the note is the note of John Franklin and not of the defendants, the court say: "From the description in the declaration the note may be in the following form:

"'I, John Franklin, President of the Mechanic Fire Ineurance Company, promise to pay.' &c. (Signed)

"'JOHN FRANKLIN.'

"Or in this form:

"'I promise to pay,' &c. (Signed)

"'JOHN FRANKLIN.'

"'President of the Mechanic Fire Insurance Company.'

"In neither form can this be said to be the note of the company. He does not say that he signs *for the company;* he describes himself as the president of the company, *but to conclude the company by his acts,* he *should have contracted in their name*, or at least in their behalf. In *Stone* v. *Wood*, the defendant described himself '*as agent of J. & R. Raymond,*' but he did not contract in their name; and it was held that he was personally liable. So here, though the president, according to the averment in the count, had authority to make a note for the defendants, yet he does not appear to have done so, in a manner to be obligatory upon them." The demurrer was sustained.

These decisions are sustained by the Massachusetts cases. The case of *Tippets* v. *Walker et al.* (4 Mass. 595,) was an ac-

tion on an agreement purporting to have been made "between the defendants, a committee appointed by the direction of the Middlesex Turnpike Corporation, to contract for making the turnpike road, of the one part, and the plaintiff of the other part." It was signed and sealed by the defendants in their individual names. The defendants were held to be personally bound. The court say: "The decision of this case must depend on the construction of the deed. If the defendants have by their deed personally undertaken to pay, they must be holden to the agreement. The defendants have not, (if they had legal authority,) put the seal of the directors, or the seal of the corporation: but have put their own seals."

In *Stackpole* v. *Arnold*, (11 Mass. 29,) which was an action on certain promissory notes, the court, in pronouncing judgment, say: "Whatever authority the signer of a note may have to bind another, if he does not sign as agent or attorney, he binds himself, and no other person."

In the case of *Packard* v. *Nye*, (2 Metcalf, 47,) it was decided, that a note in these words: "We, the subscribers, trustees for the proprietors of a new meeting house at the head of Accushnet river, promise to pay," &c., signed, "Joel Packard," "Jonathan Swift," was binding on Packard and Swift individually. The court say: "The notes, in terms, bind the signers personally, and they are called trustees as *descriptio personarum*, and to indicate the use to which the money was to be put."

The cases from the English reports, are to the same effect. In *Combe's case*, (Coke's Reports, part 9, 76 b.), the question was, as to the validity of a surrender of copyhold lands made by attorney. In delivering its opinion, the Court of Common Pleas say: "When any one hath authority as attorney to doe anything, *he ought to doe it in his name who giveth the authority;* for he appointeth the attorney to be in his place, and to represent his person; and, therefore, the attorney cannot do it in his own name, nor as his own act, but in the name, and as the act of him who giveth the authority."

The case of *Frontin* v. *Small*, (2 Lord Raymond, 1418,) was an action on a lease. The court confirmed the decision in *Combe's case*, declaring, that a person empowered by warrant of attorney to execute a deed for another, must execute it *in the name of the principal.* See the same case in 1 Strange, 705.

In the case of *Cullen* v. *The Duke of Queensbury and others*, (1 Brown's Parliamentary Cases, 396-404,) it was decided, that when the defendants, acting on behalf of a club of which they were members, entered into a contract with the plantiff to provide necessaries for the use and accommodation of the club, they were personally bound, and that the plaintiff was not obli-

ged to resort to any of the other members for satisfaction of his demands.

White v. *Cuyler*, (6 Term Rep. 176,) was an action of *assumpsit* for wages due to the plaintiff, under a written agreement under seal. On a rule to set aside the verdict, the court, *per* Lord Kenyon, Chief Justice, said: "In executing a deed for the principal, under a power of attorney, *the proper way is to sign in the name of the principal.*"

In *Wilks et al.* v. *Back*, (2 East, 142,) Wilks had authority as attorney to sign and seal a deed for his principal Browne; and the question was, whether a deed signed "*For James Browne, Mathias Wilks*, [L. S.,]" was an execution of the deed in the name of the principal. It was held to be executed in the name of the principal, Grose, J., saying: "I accede to the doctrine in all the cases cited, that an attorney must execute his power *in the name of his principal*, and not in his own name; but here it was so done; for where is the difference between signing J. B. by M. W., his attorney, (which must be admitted to be good,) and M. W. for J. B.; in either case the act of sealing and delivery is done in the name of the principal, and by his authority."

From these decisions it is evident, that to exonerate a party from personal liability, on the ground that he acted as agent, it must appear:

First. That he contracted *in the name of his principal*, and not in his own.

Secondly. That he so contracted *as to bind the principal.*

It is not enough to exonerate him, that he contracted so as to bind his principal, if he did not *also, contract and sign in the name of that principal.*

Though some of the above decisions were in actions on instruments under seal, others, (e. g. *Hills* v. *Bannister*: *Barker* v. *Mechanic Fire Insurance Company*: *Stackpole* v. *Arnold*: *Packard* v. *Nye*,) were on contracts not under seal.

What is the law of this State? Must an agent, to exempt himself from personal liability, contract in the name of his principal?

The Civil Code, art. 2954, declares, that "a procuration or letter of attorney is an act by which one person gives power to another, to transact for him, *and in his name*, one or several affairs." This is a literal translation from art. 1984 of the Code Napoleon, and the interpretation of the French Code by its commentators, will apply to our own. A mandate, then, authorizes the agent to contract for the principal, *and in his name.* A contract not made *in the name of the principal*, is, consequently, not a contract executed under the power—i. e. not one executed *as agent.*

Pothier, Mandat, No. 88, declares: "*Quoique ce soit pour l'affaire, qui fait l'objet du mandat, et en se renfermant dans les bornes du mandat, que le mandataire a fait quelques contrats avec des tiers; lorsque c'est* en son propre nom *qu'il a contracté et non pas en sa seule qualité de* mandataire d'un tel, procureur ou fondé de procuration d'un tel, *c'est, en ce cas, le mandataire qui s'oblige envers ceux avec lesquels il a contracté; c'est lui qui se rend leur débiteur principal. Mais il oblige conjointement avec lui son mandant, pour l'affaire duquel il paraît que le contrat se fait: le mandant, en ce cas, est censé accéder à toutes les obligations que le mandataire contracte pour son affaire.*" Œuvres, Ed. Dupin, vol. 4, p. 252.

Duranton, (Paris ed. vol. 18. No. 198,) commenting on the article of the Code Napoleon (1984,) identical with art. 2954 of the Code of this State, says: "*Le Code dit que le mandat consiste dans un pouvoir, donné a quelqu'un de faire quelque chose, pour le mandant,* et en son nom; *mais il n'est cependant pas nécessaire, pour qu'il y ait mandat avec tous ses effets ordinaires* entre le mandant et le mandataire, *que celui-ci ait traité au nom du mandant.*" The inference is irresistible that, as between the principal and third persons, it is necessary that the agent should have treated in the name of the principal, *pourqu'il y ait mandat, &c.*

In *Hopkins* v. *Lacouture*, (4 La. 66,) the court, *per* Porter, J. say: "The liability of the principal depends on the act done, not on the form in which it has been executed. The only difference is, *that where the agent contracts in his own name, he adds his personal responsibility* to that of the person who has empowered him." The expressions of Judge Porter are quoted by Story, in his treatise on Agency, as a clear exposition of the law on his subject. § 270.

In the case before the court, the contract was executed in the name of "*Charles Gardiner*" and "*John Nicholson,*" not in the name of the "*Samaritan Society.*" The words "a committee of the Samaritan Society" in the body of the contract, being merely, in the language of the cases quoted, *descriptio personarum.* To have executed the contract in the name of that society, it should have been signed: "The Samaritan Society, by John Nicholson, Charles Gardiner" —— or "John Nicholson, Charles Gardiner, for the Samaritan Society."

The defendants aver, that they "were acting merely *as agents for the corporation established by law, known as the Samaritan Society;*" but the evidence is conclusive, that there was not at the time of the contract, any "*corporation established by law* known as the Samaritan Society." The only ground of defence being thus disproved, on what principle can a judgment be ren-

dered for the defendants? It may be said that the words "corporation established by law known as the Samaritan Society," are surplusage—that the defence really is, that the appellants acted as agents of a Samaritan Society, an unincorporated body. Taken even in this sense, the answer does not entitle the defendants, under their own admissions and the evidence, to a judgment. In the contract, admitted to have been signed by them, Nicholson and Gardiner describe themselves as a *committee* of the society. They were, consequently, members of it. The minute book offered in evidence, also proves that they were members. Now, being members of the society, and admitting the execution of the contract, plaintiffs are certainly, under the allegations in the petition and the prayer for general relief, entitled to a judgment against the defendants for *their proportion* of the debt, and that proportion must be one-half each, *unless the defendants had alleged and proved* that there were other members, jointly bound with them. They have not alleged what persons were bound with them, nor proved who they were.

In the opinion of the court, it is stated, "that the defendants acted as agents, and *gave the name of their principal.*" This is erroneous. The defendants gave the name of the "*Samaritan Society,*" a name by which they, and others, were authorized to constitute themselves a body corporate, by the act of 20 March, 1840; but they had refused to accept the charter given by this act, and never did accept any charter until long after the date of the contract with the plaintiffs, and after the act of 1840 had been altered by an act of 1842. Their name was not the "*Samaritan Society.*" They were authorized to sue and contract by that name, only after accepting the charter.

But it is not alleged, say the court, that defendants "contracted without authority, or exceeded that which they had, or that they acted for a non-existing principal against whom no resort could be had; nor is there any other averment tending to show that the defendants, either expressly or impliedly, made themselves personally liable, although they acted as agents." The plaintiffs do not admit, that the defendants *acted as agents;* but had they acted as such, it was enough *to allege their personal responsibility*—whether that resulted from contracting without authority, or exceeding that authority, or from acting for an irresponsible principal, is matter of argument or evidence.

The facts of the case do not warrant the conclusion, that the plaintiffs gave credit to the Samaritan Society—the credit was evidently given to the individuals who signed the contract.

The court have considered art. 437 of the Civil Code, as authorizing unincorporated associations to assume a name without any express sanction of law, and to sue and contract in it. But this

article warrants no such inference. It declares nothing more, than would have been the law, had it not been inserted—to wit, that individuals, associating themselves together, though unincorporated, may acquire and possess property, and make contracts. It does not authorize individuals, purchasing or contracting jointly, to contract, or sue, or do any other act, in any other way, than in their *individual names*. Its words are: "Corporations unauthorized by law, or by an act of the Legislature, enjoy no public character, and cannot appear in a court of justice, but in *the individual name of all the members who compose it*, and not as a political body; although these corporations may acquire and possess estates, and have common interests, as well as all other private societies." A party cannot contract in a name, in which he cannot be sued, i. e. "appear in a court of justice."

Had the defendants acted as the agents of a corporation, it might have been said with some plausibility, (though the authorities show that such words would have been but *descriptio personarum*,) that, by the words, "a committee appointed for that purpose by the Samaritan Society," the name of the principal was disclosed. But if, as was the fact, the defendants' pretended principal, was but an unincorporated number of individuals, unauthorized, to use the words of art. 437, "to appear in a court of justice, but in the individual name of all the members who compose it, and not as a political body," can it be maintained that the giving up of such a name, was a disclosure of that of the principal, to wit, "*the individual names of all the members*," either literally, or substantially? That it was not a literal disclosure, is evident; that it was not a substantial disclosure, is not less clear; for if the plaintiffs had to look to the individuals composing the society, for their debt, it was all important to them, to know *the names* of the members—that they might judge of their ability, as adults, to contract, and of their solvency; and to know *their number*, as the amount for which each would be liable under such a joint contract, would depend on the *number* bound.

The court erred in concluding from *the words* in the body of the contract, that the defendants contracted *as agents*. These words are, that the "agreement was entered into between Charles Gardiner and John Nicholson, a committee *appointed for the purpose*, by the New Orleans Samaritan Society." Appointed *for what purpose?* The answer is plain—for the purpose of effecting an arrangement "*for the reception and treatment of the patients that might be sent*" by the society. But whether this arrangement was to be made *on the credit of Gardiner and Nicholson*, or of the society, is not declared, nor can it be inferred from the instrument. Such an inference can only be drawn from facts disclosed by the evidence.

As to the liability of defendants in this case under the general principles of English law, the court is referred to Story on Agency, § 287: "Although it is true," says Story, "that persons contracting as agents, are ordinarily held personally responsible, where there is no other responsible principal to whom resort can be had; yet the doctrine is not without some qualifications and exceptions, as, indeed, the words 'ordinarily held' would lead one naturally to infer. Thus, for example, *if private persons should subscribe a sum towards some charitable object*, and should request an agent to employ tradesmen, and others, to supply materials to carry it into effect; and *it should be distinctly made known by the agent, that the tradesmen and others were not to look to him, or to the subscribers personally, for payment, but that they must solely depend upon the success of the charitable subscription, and the state of the funds;* and the supplies were *furnished with this clear understanding*, there could be no doubt that neither the subscribers (at least, beyond their subscriptions,) nor the agent, would be personally responsible."

In this case according to Story, to exempt the agents from personal liability, it should have been "*distinctly made known*" *by Nicholson and Gardiner to the plaintiffs, that they* "*were not to look to them for payment*," but "*that they must solely depend upon the success of the charitable subscription and the state of the funds;*" and it should have been further shown, that the treatment and "supplies *were furnished with this clear understanding*." Can this tribunal, in the absence of any such proof, reverse the judgment, and say to the plaintiffs that they can only recover, by making all the members of the society parties to the action—and this though no exception of non-joinder was made *in limine litis*, nor at any time below?

MARTIN, J. The plaintiffs have prayed for a re-hearing, and have favored us with a printed argument in the form of a petition. They have cited a great many authorities, tending to show the nature of the responsibility of agents, particularly in cases in which they incur a personal liability. They have not appeared to us applicable to the judgment complained of, which is the result of the impression we have received, that the plaintiffs were desirous of securing the responsibility of the funds of the society, if it was incorporated, and if it was not, that of all its members.

It is urged, that the petition concludes with a prayer for general relief, under which judgment may well be given against the defendants, as it appears, that they were acting as a committee of the society, appointed to contract with the plaintiffs, which shows

they were members, and, consequently, liable as such, the society being an unincorporated body. But, the defendants are sued as agents, and it is as such that all the artillery of the plaintiffs' counsel, is directed against them. Could they have foreseen, that their membership was the ground on which they were attacked, they might have insisted, on naming their fellow members, that the proceedings should be stayed, until they were all brought in. This is what was intended to be said, in those parts of the judgment, which the counsel says he is unable to reconcile.

We have assumed, that the society was debited on the books of the plaintiffs, on the evidence which we saw in the account annexed to the petition, and made part of it. Their counsel now tells us, that this account was made out for the sole purpose of being used as the foundation of this action. But we think, that the admissions in the pleadings, cannot be destroyed by the unsupported suggestions, which the ingenuity of the counsel may urge.

The credit given in the account annexed to the petition, for the rent of a house underlet from the society by one of the plaintiffs, is, certainly, some evidence that they considered the society as their debtor.

The counsel lastly, asks, whether the court is prepared to say, *that a party can contract in a name, in which he cannot be sued.* This question may be answered in the affirmative. Persons connected in commerce, may contract under a firm which does not contain the christian names of either of them, nor even their surnames, although they cannot be effectually sued, without the proceedings being carried on against them in their individual names; which, we admit, must be given in the exception, they might oppose to the petition, for want of a proper description of the defendants.

Re-hearing refused.

JOHN PETWAY *v.* JOHN GOODIN and another.

In proceedings under the 13th section of the act of March 20, 1839, by which a plaintiff who has applied for a writ of *fi. fa.* is authorized to propound interrogatories to a third person, believed to have property in his possession, or under his control, belonging to the debtor, or to be indebted to him, the formalities of law must, as in cases of attachment, be strictly complied with, under penalty of nullity. Thus, where interrogatories have been propounded to a third person to be answered in open court within a certain time, and they are ordered to be answered "as prayed for and according to law," but without any particular day having been appointed therefor, the party interrogated is not bound to answer, and, on his failure to do so, the interrogatories cannot be taken *pro confessis*. Where interrogatories are required to be answered in open court, the plaintiff must move the court to appoint a day on which the answer shall be made; and where he proceeds to trial without having done so, his right to have the interrogatories answered will be considered as waived.

Garnishees in cases of attachment, and third persons to whom interrogatories are authorized to be propounded by the 13th section of the statute of 20th March, 1839, are parties to the controversy at least as between the plaintiff and themselves, and may be required to answer, in open court, any interrogatories propounded to them.

APPEAL from the District Court of the First District, *Buchanan*, J.

E. C. Mix, for the plaintiff.

Peyton and *I. W. Smith*, for the appellants, contended that plaintiff, by failing to cause a day to be appointed on which the interrogatories should be answered, waived his right to have them taken *pro confessis*, on the failure to answer. *Stewart* v. *Caslin*, 2 La. 72. *Allain* v. *Truxillo*, 14 La. 299.

SIMON, J. The plaintiff, having obtained judgment against the defendants, *in solido*, for the sum of $1210 07, with interest, issued a writ of *fieri facias*, by virtue of which the Sheriff seized in the hands of Junius Amis & Co., all the goods, chattels, rights, credits, moneys, and property of any kind, which they might have in their possession or under their control, belonging to the defendants or either of them; whereupon said plaintiff, acting under the 13th section of an act of 1839, (Acts, p. 166,) filed his petition, representing that he has good reason to believe, that Junius Amis & Co., a commercial firm composed of Junius Amis, Samuel But-

terworth and Francis Leach, have in their possession, or under their control, rights, property or credits sufficient to pay the amount due him, inasmuch as Theophilus Freeman, one of the defendants, is one of the firm of Junius Amis & Co. He, therefore, prayed, that *Junius Amis, Samuel Butterworth* and *Francis Leach*, composing the commercial firm of Junius Amis & Co., might be made party garnishees, that they might be cited to appear and answer *separately, and each for himself*, the annexed interrogatories *in open court, under oath, in ten days* from the service thereof; and that, in default thereof, judgment might be entered up against said firm for the amount of the judgment and interest, &c. An order, was accordingly granted by the Judge, *a quo*, directing the interrogatories to be answered by the garnishees *as prayed for, and according to law.*

Copies of the petition, interrogatories and citation were served upon the three garnishees, in the following manner, as appears from the Sheriff's returns: those for Junius Amis, were left at his office in Camp street with his partner and agent, Francis Leach, he, Amis, being absent; those for Samuel Butterworth, were also left at his office with his partner and agent, Francis Leach, he, Butterworth, being absent; and those for Francis Leach, were served upon him personally.

Francis Leach answered the plaintiff's interrogatories in writing, negativing completely the latter's allegations of Freeman's being a partner in the firm of Junius Amis & Co., of his having any rights, credits, moneys or property of any kind in the possession, or under the control of said firm, or of any of the members thereof; and of his, Freeman's, having any interest in any plantation and slaves purchased by any member of said firm. He, Leach, subsequently filed an affidavit, in which he stated that the two other members of his firm were absent beyond the State at the time the citations were issued; that they were expected to remain absent until the fall, (this proceeding was had in June, 1844,) and that they cannot have a knowledge of this proceeding except from other sources, &c.

In August, 1844, Theophilus Freeman was arrested at the suit of the plaintiff; but the writ of arrest having been dismissed, another proceeding was had against him by said plaintiff, in

September, by virtue of which Freeman was again arrested, and the writ of arrest was again set aside, on the motion of the plaintiff's counsel.

In November following, a judgment by default was taken against Amis and Butterworth, which was subsequently made final, and they were condemned to pay *each* the amount of the judgment, with interest and costs, on the only ground, that having been cited to answer the plaintiff's interrogatories, and having failed to do so, the same should be taken as confessed. A motion for a new trial was made by the two garnishees on divers grounds, supported by the affidavit of Butterworth, contradicting the statement made by the Sheriff in his return, of Francis Leach being his agent, and denying his ever having had at any time any funds in his hands, either as a partner of the firm of Junius Amis & Co., or individually, belonging to Freeman or to the defendants; but the Judge, *a quo*, being of opinion that the plea of want of citation can only be made available in an action of nullity, overruled the motion, and signed the judgment from which the garnishees have appealed.

The thirteenth section of the act of 1839, (B. & C.'s Digest, p. 458, § 3,) under which this proceeding was had, enables a plaintiff who has applied for a writ of *fieri facias* against the defendant, to garnishee the latter's property in the hands of third persons, and *to cause such third persons to be cited to answer under oath, such interrogatories as may be propounded to them, &c., in the same manner, and with the same regulations, as are provided in relation to garnishees in cases of attachment;* and *such third persons are bound to answer in the same manner, and are liable for their neglect or refusal to answer, and their answers may be disproved in the same manner, as those of garnishees.* Code of Pract. art. 263. It follows, therefore, that although this law was enacted for the purpose of facilitating the recovery of just debts, and of preventing debtors in bad faith from screening their property, and particularly their personal effects, from the pursuit of their creditors, and thereby avoiding their being levied on by virtue of executions issued in due course of law, it should not be made to operate an injustice on innocent third persons, against whom judgment creditors

think it proper or necessary to avail themselves of it, and that, as in cases of attachment, the proceedings pointed out by law, should be strictly complied with. 3 La. 18. 8 Ib. 586. 3 Rob. 232.

Now, among the different informalities which the appellants' counsel has urged in the argument of this cause, as existing in the proceedings which preceded the rendering of the judgment complained of, and as sufficient to cause it to be annulled, there is one, which, in our opinion, destroys the very foundation of said judgment, nay, the only ground upon which it was rendered. It is this: The plaintiff, in his petition, has prayed, that *each* of the three garnishees be ordered to answer his interrogatories *in open court* in ten days from the service thereof, and the Judge, *a quo*, accordingly ordered that they should be answered *as prayed for, and according to law.* Thus, the appellants, supposing they had been regularly cited, were bound to appear in court, and to take notice of the day appointed to that effect by the Judge, on which their answers should be taken, in order to be prepared to comply with the prayer of the plaintiff's petition. Code of Pract. art. 351. No day, however, was appointed by the court, *a qua;* one of the garnishees answered, *ex parte*, and in writing, and the interrogatories were taken, *pro confessis*, as to the two others. This was clearly irregular and illegal. We have repeatedly held, that whenever a party thinks proper to propound interrogatories to his adversary to be answered in open court, he is bound to move the court to appoint a day to that effect; that his neglecting to do so, dispensed the party interrogated from the obligation of appearing; and that, by proceeding to trial without procuring the appointment of a day, the party interrogating waived his right to his adversary's answer to the interrogatories. 2 La. 72. 14 Ib. 299. A day must be fixed, and it is not sufficient that the party interrogated should be called upon to answer the interrogatories in open court within ten days from the service thereof, which is the legal delay for answering to the petition, (Code of Pract. arts. 252 and 262,) or within any other period not amounting to the appointing of a special day to that effect, as required by law.

A point has been made, however, that, in cases of attachment, the law does not authorize garnishees to be interrogated to an-

swer in open court, (Code of Pract. arts. 247, 263,) and that therefore art. 351 does not apply; and this appears to have been the view taken by the Judge, *a quo*, when, seeing that two of the garnishees had not answered in writing, he took the interrogatories, *pro confessis*. On the part of the plaintiff, it has been insisted, that the words of the Judge's order "*according to law*," meant that the interrogatories should have been answered in writing, and that the garnishees were bound to do so, *ex parte*; and, on the part of the appellants, it has been contended that, as the garnishees had been required to answer in open court, which is not permitted by law in cases of attachment, they were not bound to answer at all.

We think both positions are erroneous, and that, in cases of attachment, as well as in any other case, a party interrogated on facts and articles may be required to answer interrogatories *in open court*. Art. 247 provides, it is true, that *a creditor may annex to his petition interrogatories on facts and articles, to be answered categorically under oath by the garnishee, as to the nature of the property belonging to the defendant*, &c., and so does art. 348 with regard to the right which one of the parties to a suit has to interrogate the other; but garnishees, in cases of attachment, or in a proceeding of this kind, though not parties to the original suit, are properly parties to the controversy that arises between them and the defendant's creditor, with respect to the object of the proceeding; (Code of Pract. arts. 250 and 246;) they have their rights to defend; they are necessarily litigating their rights with those which a creditor of the principal defendant seeks to enforce, or exercise upon property in their possession; and, so much so, that they may be condemned to abandon said property for the benefit of another, to suffer it to be seized and sold, or, as in this case, to pay the whole amount of the debt. They are parties to this litigation, adversaries of the seizing or attaching creditor, and art. 351 of the Code, making no distinction, says: "*The party propounding interrogatories may require the party interrogated to answer in open court, &c.*" Here, the garnishees were the parties interrogated; there is nothing in art. 247 and 263, which dispenses them from answering in open court; nay, the article does not indicate in what

manner their answers should be taken or received; and we are of opinion, that they would have been bound to answer in open court, if a day had been appointed by the Judge for that purpose.

With this view of the question, we conclude that the judgment appealed from was improperly rendered; but, as the counsel of the parties, and the Judge, *a quo*, seem to have been under different impressions with regard to the manner in which the interrogatories propounded by the plaintiff were to be answered, which we consider erroneous, we think this cause ought to be remanded to the lower court for further proceedings according to the views above expressed.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed; and that this cause be remanded to the inferior court, to be proceeded in according to law, the appellee paying the costs of the appeal.

Succession of Eleonore Pigneguy.—Aristide Barré, Appellant.

Where one of the heirs mortgages his undivided share in certain immoveables belonging to the succession, and they are subsequently sold under an order of the Probate Court, for the purposes of liquidating and partitioning the succession, the proceeds of the sale of the share so mortgaged will stand in place of the property, and be subject, in the hands of the administrator, to the claims of the mortgage creditor, as if no sale had been made. Act, 27 March, 1843, s. 2.

Appeal from the Court of Probates of New Orleans, *Bermudez*, J.

Morel, for the appellant.

Marsoudet, contra.

Morphy, J. Jean D. Pigneguy, Jun., one of four heirs of the late Eleonore Rabassa, the widow of Jean Pigneguy, mortgaged his undivided fourth of two immoveables belonging to the estate, to secure the payment of three promissory notes of $1250 each, which he had executed in favor of Clement Ramas, in 1840. Some time after, a sale of the property was made under an order of the Court of Probates, for the double purpose of liquidating the succession, and of effecting a partition among the heirs, which

had been prayed for by the said Jean D. Pigneguy, the only heir of age. Philippe Marsoudet, who was subsequently appointed administrator to the estate, filed an account of his administration, from which it appeared, that after the payment of the debts and charges of the succession, there was a sum of $2805 60, accruing to Jean Pigneguy, for his share or interest in the same. In this account, which was homologated on the 28th of February, 1842, the administrator mentions, that this amount must go to pay Jean Pigneguy's three protested notes of $1250 each, to secure which, he had mortgaged his undivided fourth of the property sold; but that he does not know in whose hands one of these notes is. In March, 1843, Aristide Barré having become the purchaser at a sheriff's sale, of the hereditary rights of Jean D. Pigneguy, Jun., in the succession of his mother, took a rule on the administrator to show cause, why an execution should not be issued against him, under which his individual property should be seized, and sold to an amount sufficient to pay him the said sum of $2805 60, allotted to Pigneguy, whose rights he had purchased. The administrator, in answer to the rule, stated, that Pigneguy had mortgaged his undivided portion of the property held in common between him and his co-heirs, to secure the payment of three notes exceeding in amount the sum of $2805 60, coming to him, and that the said sum, had been rateably distributed among, and paid to the mortgage creditors holding the said notes. There was a judgment below in favor of the administrator, and the plaintiff in the rule appealed.

The evidence shows, that the administrator was himself the holder of two of the notes executed by Pigneguy, and secured by mortgage on the property sold. These notes he filed, erased, and cancelled. He also filed the third note, on which he proved that he had paid the proportion coming to it, out of the sum of $2805 60. C. Claiborne, the holder of this last note, had obtained a judgment upon it against Pigneguy, in the District Court, and had seized in the hands of the administrator, in February, 1842, any funds accruing to his said debtor, in the succession of his mother. Under these facts, it would seem that the appellant is without any claim whatever against the administrator, under his purchase of Pigneguy's hereditary rights; but it is contended

that the mortgage he granted on the property held in common between him and his co-heirs, was annulled, by operation of law, in consequence of the partition; and that he was entitled to receive his proportion of the price it brought, in the same manner as if no such mortgage had been given. This pretension is attempted to be sustained under article 1434 of the Civil Code, but it is manifest that this article, especially when considered in connection with articles 1342 and 1343, does nothing more than carry out the legal axiom, *resoluto jure dantis, resolvitur jus accipientis*, which is embodied in articles 3268 and 3374 of the same Code; and it by no means follows, that the nullity of such a mortgage, which is pronounced in favor of the co-heirs or purchasers of the property, in whose hands it passes free from incumbrance, is to avail or enrich the mortgagor at the expense of his hypothecary creditors. If, in the partition of the succession, the mortgagor receives for his share an immoveable, the mortgage which he had before given on his undivided portion of all the property held in common continues to exist, but is restricted to, and becomes absolute upon that immoveable. Art. 1434. If he is to receive in money his share of the common property sold, or partitioned in kind, the mortgage is transferred from the property to its proceeds in the hands of his co-heirs. In accordance with these principles, and with a view to protect the rights of creditors holding mortgages against one of several co-proprietors, the Legislature, in an act approved on the 27th of March, 1843, (p. 44 of the Statute Book,) has provided, "that if (in a partition) any return of money be required to be made to any co-proprietor whose share is mortgaged, by reason of the share allotted to him being of less value than the other shares, then such sums of money shall remain in the hands of the parties bound to contribute it respectively, shall be secured by mortgage on their respective shares, and be subject to the demands of those creditors of their co-proprietor, who possessed mortgages or privileged claims against him, and according to the rank and priority of said creditors." The rule, which is here so clearly laid down, where only a portion of his share is to be received in money by a co-proprietor who has mortgaged his undivided interest, must, we apprehend, be the same when he is to receive the whole of his portion

in money, and whether the same be in the hands of his co-heirs, or in those of an administrator. In the present case, the appellee being the holder of two of the mortgage notes executed by Pigneguy, was clearly entitled to retain his proportion of his debtor's share in the proceeds of the property he had mortgaged. As to the third note held by Charles Claiborne, independent of his right to be paid as a mortgage creditor, he had made a seizure in the hands of the administrator of the share or portion accruing to Pigneguy, long before the latter's hereditary rights were seized and sold to the appellant, who is, consequently, without any claim whatever against the administrator under his purchase.

Judgment affirmed.

Henry Lawrence *v.* The Second Municipality of New Orleans.

The owner of land illegally taken for public use by the authorities of a city, may recover its value at the time it was taken, in an action for damages. On the receipt of the damages the property will cease to belong to the plantiff.

Appeal from the Parish Court of New Orleans, *Maurian*, J. The plaintiff alleges, that the defendants are indebted to him in the sum of $4100, with legal interest from 1st of December, 1836, for this, that said defendants did in or about that day take possession of a lot of ground belonging to him without any right so to do, converting it to their own and the public use, by making it part of a paved street called Roffignac street; "so that said lot of ground is no longer the property of petitioner, who has a right to be paid the price and value thereof, by said Municipality, which price at the date of said conversion of the property to the public use by defendants, was $4100, &c." The petition concludes with a prayer for general relief.

The defendants answered by a general denial: denied that plaintiff had any title to the land in controversy; averred that it formed part of the land taken to form Roffignac street, in virtue of certain proceedings before the District Court of the First District and that said proceedings had been discontinued.

There was a judgment below declaring that the land belonged to plaintiff, at the time it was taken possession of by defendants; that such conversion to the public use, raised an implied promise on defendants' part to pay its value at the time, with interest from that time; and that its value was $4100. From this judgment the defendants appealed.

Benjamin, for the plaintiff.

Rawle, for the appellants.

Bullard, J. In the case of *Hullin and Richardson, Syndics of Barrett and Cannon* v. *The Second Municipality*, (11 Rob. 97,) we held, that there was no implied contract on the part of the defendant, arising out of the inchoate proceedings to open Roffignac street, and the taking possession of the lots, to pay the sum sued for, as the price of the property,—but that, in our opinion, the plaintiffs might claim the property, or damages for the injury resulting from their having been deprived of it, and that none of the parties could claim any rights under those inchoate proceedings.

In the present case, the owner of another lot, which was taken by the defendants, and retained by them and converted into a street, and thus devoted to public uses, sues for damages, which he estimates at the value of the lot, and that value is shown by proofs independently of the proceedings to open Roffignac street.

The defendants answered to the petition, that Lawrence, the plaintiff, has no title to the property described in his petition; and they deny all the allegations. In a supplemental answer, they repeat their denial of the plaintiff's title, and further allege, that the proceedings to open Roffignac street have been discontinued.

The action is one of trespass, and the only defence is, first, that the property never belonged to the plaintiff; and secondly, that the Municipality has desisted from its plan of improving Roffignac street. But the plaintiff has shown that the lot was his property; that it is worth four thousand one hundred dollars; that it has been taken by the defendants, made part of a public thoroughfare, and dedicated to public uses. He sues for damages resulting from those unauthorized proceedings, and not for the price as agreed upon, either expressly or tacitly, by the defendants. It is not pretended, as in the case of Hullin, syndic, &c.,

against the same defendants, that the property is subject to incumbrances, and that the plaintiff is acting *en auter droit.* It is true, that if the plaintiff in this action of trespass, should recover the value of his property, it would cease to be his; because his recovery and receiving the amount of damages, would imply his assent to the dedication of the lot to the public uses for which it was taken by the defendants. If the defendants had offered to make restoration, and to pay reasonable damages for the detention of the property, as in the last named case, the result might have been different. But they have chosen to rely exclusively on a defence, which is unsustained by the evidence, and we conclude that they are liable for the damages claimed.

SAME CASE.—ON A RE-HEARING.

Rawle, for the appellants. This is not an action of trespass; nor does plaintiff sue for damages; yet the court reasoning upon it as such, has affirmed the judgment below, which declared that there has been an implied sale of the property. That there was no such sale; see *Hullin* v. *The Second Municipality*, (11 Rob. 97.) The only question here is, as in that case, whether the acts of the Municipality authorized plaintiff to claim under an implied sale. The opinion just rendered, is erroneous and at war with the decision in 11 Rob. 97. To entitle the plaintiff to damages, the defendants should have been put *in mora.* This is a condition precedent, and the want of it need not be pleaded, but may be taken advantage of at any time. Civ. Code, art. 1906. *Hodge* v. *Moore*, 3 Rob. 400. There was no sufficient evidence of the value of the land.

BULLARD, J. A re-hearing was granted in this case on a suggestion, that we had overlooked a bill of exceptions taken to the admission of certain evidence to prove the value of the lot in question. We have reconsidered attentively the questions which the case presents, and are still of opinion, that the pleadings are sufficient to authorize the plaintiff, whose property has been taken for public uses without legal forms, to recover its value; and

the only doubt we entertain is, as to the sufficiency of the evidence to prove that value as to the Municipality. We have said, and still think, that the appraisement by the commissioners, which was set aside, and the proceedings to open the street discontinued, is not sufficient evidence of its value, and that the parties can acquire no rights under those inchoate proceedings; nor is the price recited in the conveyances, strictly speaking, legal evidence against the defendants. The value of the lot, at the time it was taken for public uses, ought to be shown distinctly, by legal evidence given in the case. It is for this purpose alone, that we think justice requires the case to be remanded.

The judgment is, therefore, reversed and the case remanded for a new trial; the costs of the appeal to be borne by the appellee.

WILLIAM KRÆUTLER and another *v.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES.

One who resides out of the State may appeal from a judgment rendered against him at any time within two years from the day on which final judgment was rendered (C. P. 593); and where plaintiffs allege in their petition and affidavit for an attachment that defendants are non-residents, it is sufficient evidence of such non-residence.

Where the attorney appointed to represent absent defendants applies, as such attorney, for an appeal from a judgment against them, alleging in his petition that there is error to their prejudice in the judgment, and praying, on their behalf, for the appeal, and the appeal is allowed to them by the order of the judge, the appeal must be considered as taken by the defendants.

In an assignment of errors, the error must be plainly and fully stated; and nothing can be assigned as error which depends on the facts of the case, or which might have been cured by legal evidence on the trial.

In an action on a bill accepted by an agent, the evidence of witnesses who testify that they had seen the written authority by which defendants empowered the agent to accept bills for them, will be admissible, where the power itself is not in plaintiff's possession, nor under his control.

APPEAL from the Commercial Court of New Orleans, *Watts*, J. *Peyton* and *I. W. Smith*, for the plaintiffs.

T. Slidell, for the appellants.

GARLAND, J. This is an action on a bill of exchange for £5000 sterling, drawn in London, by C. F. Mercer, as the attorney of the Union Bank of Florida, on Samuel Jaudon, agent of the Bank of the United States in said city, and accepted by him as such. The bill was protested for non-payment at maturity, and interest and damages are claimed according to the law of England. The suit was commenced by attachment, and a number of persons cited as garnishees, among whom is Robert Copland, now an appellee in one of the two appeals which have arisen out of this case. See 11 Robinson, 160.

The petition was filed on the 15th of May, 1843, and an attachment was taken out on the same day, and notice of it given to the garnishees. The Sheriff concludes his return on it by saying: "The defendants residing out of the State, I posted copies at the door of the church, and at that of the room in which this honorable court is held." No citation was issued directed to the defendants at all. On the 16th of May, Thomas Slidell, Esq. was appointed by the court to represent the absent defendants as their attorney; and, on the same day, a citation addressed to him as such, was issued, and served by the Sheriff. Mr. Slidell took no exception to the irregularity of, or want of citation to the defendants; but some months after, filed an answer to the merits, denying in general terms the justice of the demand.

At the trial, the plaintiffs proved that the bill was signed by Mercer, as the attorney in fact of the Union Bank of Florida, which he was reputed to be, in London; and that it was delivered by him to the plaintiffs, to hold as security for the repayment of a much larger sum of money, which they had previously, at the joint request of Mercer and Jaudon, as attorneys as aforesaid, advanced to the Union Bank, under the guaranty of the Bank of the United States. They further proved, that Jaudon accepted the bill as attorney, or agent of the Bank of the United States, and that he "was the duly authorized agent and attorney of the Bank, and that he acted in that capacity in London, from about the month of November, 1839, down to about the month of November, 1841." The witness said, that he had

seen and read the power of attorney granted to Jaudon by the president and directors of the United States Bank, dated August 23, 1839, and it authorized him, among many other things, "to contract and agree generally in behalf of the Bank, and to draw, accept, endorse, and negotiate and deliver all such drafts, checks, bills, bonds, or other securities or evidence of debt, as he, the said Jaudon, might think proper and fit." Upon this evidence, and proof of protest of the bill, a judgment was, on the 15th of December, 1843, given for the plaintiffs, from which, on the 27th of January, 1845, an appeal was taken by the defendants.

The first question presented to us, is a motion to dismiss the appeal on two grounds, *first*, because more than one year had elapsed from the rendition of the judgment before the appeal was taken; and *secondly*, because the right of appeal can only be exercised by the defendants, and not by their attorney in his capacity as such. In reply to the first ground, it is stated and shown by the record, that the Bank is a non-resident, being a corporation located in another State, and has under art. 593, of the Code of Practice, a right to appeal within two years. This answer to the motion to dismiss, appears to us conclusive. The plaintiffs, in their petition and affidavit, say that the president, directors, and company of the Bank reside out of the State of Louisiana, and, on that ground, claim an attachment against them. They cannot now recall these allegations, and deprive the appellants of their right to appeal.

As to the second ground for dismissal, we are of opinion that it is insufficient. The petition of appeal, it is true, is in the name of the attorney appointed to represent the Bank; but he alleges, that the error in the judgment is to the prejudice of the defendants, wherefore, he prays, in their behalf, for an appeal, and it is granted to them in the order of the Judge. We do not look so much to the form pursued as to the substance, and no one can hesitate in saying, that the appeal is that of the Bank. The attorney as such, has no such interest known to us, as will authorize him to appeal separately from those he represents. We are, therefore, of opinion, that the appeal ought not to be dismissed.

The appeal was made returnable on Monday, the 10th of Feb-

ruary, 1845; but, as a record already in this court was to be used, it was, in fact, filed here on the same day it was granted by the inferior court, to wit, the 27th of January. On the 17th of February, the appellant sfiled as points: 1st, "The judgment is a nullity, the proceedings anterior thereto being informal and void, and should be so declared." 2d. If it is not null and void, yet it is against law and evidence, and should be reversed.

On the 24th of February, the counsel representing the absent defendants filed another paper in court, which, on its face, is an answer to the petition of appeal, taken by the plaintiffs from an order or decree of the Commercial Court, authorizing Robert Copland to file certain answers as a garnishee. In this document, the counsel, after denying that there is any error to the prejudice of the plaintiffs in the decrees appealed from, prays that those decrees, so far as adverse to the appellants, may be affirmed. He then proceeds, and asks this court to declare the principal judgment against the defendants a nullity, because, all the proceedings anterior thereto were informal and insufficient in law, whereon to found said judgment, "and especially for want of citation." The court is asked to decree various other matters and things, but no other irregularity anterior to the judgment is specifically set forth, other than the want of a citation directed to the defendants by name.

The appeal taken by the defendants, and that taken by the plaintiffs from the decrees in favor of Copland, were argued together in this court; and the counsel has used his points and objections filed in one case, to aid him in defeating the plaintiffs in the other. This practice we do not think is sanctioned by law. The points upon which the defendants intended to rely, should have been stated in each case, in the manner directed, so that the plaintiffs might know how to meet them. The counsel for the defendants says, that this case, and some others against them, are peculiarly situated, and that he feels bound to resort to the most technical practice to defeat them. This he has a right to do; but the counsel on the other side say, that the rule must work both ways; and they also stand on the letter of the law, and say that the defendants cannot have the benefit of any errors of law appearing on the face of the record, as they have

not alleged them in writing, within ten days after the record was filed in court.

There is no doubt but the nullity of a judgment can be demanded on the appeal, when the nullity is apparent on the record; (Code of Pract. art. 609;) and the want of a citation, when the proceedings are not *in rem*, is such an apparent error as will annul the judgment. 3 La. 451. But the Code of Practice, art. 897, directs in what manner the apparent error must be made known. It says, when the appellant does not rely wholly on a statement of facts, an exception to the Judge's opinion, or a special verdict, to sustain his appeal, but on an error of law appearing on the record, he shall be allowed to allege such error, if in ten days after the record is brought up, he files a written paper stating specially such errors; otherwise his appeal shall be rejected. There are many decisions of this court stating what can be assigned as apparent error, and what cannot; and there are no principles better settled, than that the party complaining must plainly and fully state the errors, and that nothing can be assigned which depends on the facts of the case, nor which could have been cured by legal evidence on the trial. 6 Mart. N. S. 640. 2 La. 225. 6 La. 72. 10 La. 154. 11 La. 92. In the case before us, the errors alleged as apparent are set forth in the most general terms; they were not filed within the ten days succeeding the filing of the record; and it is by no means clear that the objections now raised, if they had been made in the court below, might not have been cured by legal testimony. The Sheriff could probably have amended his return, and have shown that the citation was legally posted on the doors of the church and court-room, and other evidence could probably have been introduced to establish the regularity of the proceedings. We admit, that there was much force in the objections raised by the counsel in argument, and if he had pursued the course indicated by law, it is possible we should have been compelled to annul the judgment. But a strong case must be made out to entitle a defendant to relief, whose counsel makes no objection to the regularity of the proceedings in the inferior court, but files an answer to the merits, and some sixteen months after a judgment has been rendered,

comes into this court, and raises exceptions that could have been examined and tried in the first instance much more satisfactorily.

Upon the merits, the counsel for the defendants urges, that there is no evidence of authority in Jaudon to accept the bill. We think otherwise. Gridley, a witness for the plaintiffs, says, that he has seen the power of attorney, and that it authorized the agent, Jaudon, to draw, accept, endorse and negotiate bills of exchange and promissory notes, &c., as he might think proper and fit. The testimony of this witness, and that of Huston, the clerk of the plaintiffs, was admitted without objection, and, in the absence of any proof to the contrary, make out the case. If Jaudon exceeded his authority in any respect, it was very easy for the defendants to have proved it. They knew what authority he possessed, and could no doubt have produced the power of attorney, if its production would have been of any service. It is not in the possession of the plaintiffs, nor under their control, and all they can do is to prove its contents.

It is ordered and decreed, that the judgment be affirmed with costs.

Same Case.—On a Re-hearing.

Where the record contains all the evidence introduced on the trial, or a statement of facts on which the appellant relies either wholly or in part, the appeal cannot be dismissed for want of a formal assignment of errors. C. P. 897.

An absentee against whom an action has been commenced by attachment, must be cited by affixing copies of the attachment and citation on the door of the parish church, or of the room in which the court sits, as directed by art. 254, of the Code of Practice. Service of citation on the attorney appointed to represent the absentee, is insufficient. Citation being the basis of every action, (C. P. 206,) and the formalities prescribed by art. 254, of the Code of Practice, being in lieu of it, their omission will be fatal.

Informalities in the citation of an absentee, against whom suit has been commenced by attachment, cannot be waived by any act of the attorney appointed to represent him, as by filing an answer to the merits, without objecting to the citation, &c.; and such informalities may be taken advantage of, for the first time, on appeal.

T. Slidell, for the appellants. This suit was commenced by attachment against an absent defendant. The record of appeal

comes up with a certificate, declaring that it contains all the proceedings and evidence on which the cause was tried.

The judgment was a nullity for want of citation.

The mode of citing an absent defendant in an attachment case, is by posting at the door of the church or court room, a citation addressed to him. In the language of this court in *Putnam's case*, (3 Robinson, 233,) "it has been repeatedly held, that the formalities prescribed by article 254, of the Code of Practice, stand in place of citation, and that they form the basis on which all the subsequent proceedings in the cause must rest: the omission of them must therefore be fatal. Code of Pract. art. 206. 10 Mart. 472. 7 Mar. N. S. 160. 8 Ib. N. S. 351. 8 La. 587. 3 Ib. 18."

But it is declared by the court:

1. That the ground of nullity, should have been assigned as error by a written assignment, filed within ten days after the record was brought up.

2. That nothing can be assigned as error, which could have been cured by legal evidence in the court below.

3. That the nullity arising from want of citation, was cured by the attorney appointed for the absent defendant, pleading to the merits, without taking any exception to the want of citation.

I. The court observes: "There is no doubt but the nullity of a judgment can be demanded on the appeal, when the nullity is apparent on the record; (Code of Pract. art. 609;) and the want of a citation, when the proceedings are not *in rem*, is such an apparent error as will annul the judgment. 3 La. 451. But the Code of Practice, art. 897, directs in what manner the apparent error must be made known. It says, when the appellant does not rely wholly on a statement of facts, an exception to the Judge's opinion, or a special verdict to sustain his appeal, but on an error of law appearing on the record, he should be allowed to allege such error, if in ten days after the record is brought up, he files a written paper, stating specially such errors as he alleges; otherwise his appeal shall be rejected." The article is, not as quoted by the court, "when the appellant does not rely *wholly* on a statement of facts;" but, "when the appellant does not rely wholly, *or in part*, on a statement of facts." Defendants did not

rely "*wholly*" on a statement of facts; but did rely "in part" upon it, and are therefore within the exemption, and not bound to assign errors in writing within the ten days. No case can be found of a dismissal for failure to assign errors within the ten days, where the record contained the evidence. In *Lacy* v. *Fluker*, 1 La. 52, the assignment was not filed within the ten days, and the appeal was dismissed; but, says Judge Mathews, "the record contains no statement of facts." So in 6 La. 144, in 6 La. 157, and in 1 Rob. 460, there was no statement of facts.

But when the record does contain a statement of facts, the appellant who also relies on errors apparent is not bound to assign them within the ten days, nor to file them in writing at all, but may present them orally at the hearing. This is distinctly decided in the case of *The State* v. *The Bank of Louisiana*, 5 Mart. N. S. 340. The language of the court is: "On this part of the case, our opinion is with the counsel of the bank. He has not resorted to this assignment of errors, to sustain his appeal; he had a statement of facts to rely on in the documents, and testimony that came up with the record. He is therefore, at liberty at *any time*, even without a formal assignment, to draw our attention to any apparent error."

II. The second ground upon which the court has refused relief, is, that nothing can be assigned as error which could have been cured by legal evidence in the court below.

This principle is correct, but is inapplicable to the present case.

In every case, we believe, in which that rule has been enforced, it will be found, that the record contained no statement of the evidence upon which the judgment was rendered.

In the present case, every tittle of evidence adduced in the court below is in the record. How then can it be said, that the apparent nullity proceeding from want of citation, may have been cured below by evidence there adduced? To suppose so, is to suppose the record to be false; it is to suppose, not merely something not found in the record, but something positively inconsistent with it. The reason of the rule is this; when the appellant has not spread the evidence before the court, and the point alleged as error was susceptible of being covered and cured by evidence, the appellate court will suppose in favor of the judgment of the

inferior Judge, that such evidence was actually adduced before him.

III. The third ground assumed by the court is, that the nullity arising from the want of citation, was cured by the attorney appointed by the absent defendant, pleading to the merits without taking any exception to the want of citation.

If, in an ordinary case, a defendant appearing in person, or by counsel retained by him, should file a plea to the merits, we are quite willing to concede that it would be a waiver of an informality in the citation, or of its utter absence. But an attorney appointed to represent an absentee, could not directly nor by express agreement waive citation.

In the case of Edmonson, 13 La. 283, the attorney appointed to represent an absent defendant, entered into an agreement to waive the authentication of the official capacity of the officer to whom a commission was addressed. This court rejected the evidence so adduced, although admitted by the court below, declaring the attorney appointed incompetent to make such an agreement.

In *Collins* v. *Pease*, 17 La. 117, this court reiterates the doctrine. "We are of opinion that a person appointed by a court to defend the rights of absentees in a suit against them, ought not to be permitted to surrender any lawful means of defence on their part, to the injury of those whom he represents."

But the case of *Stockton et al.* v. *Hasluck et al.*, (10 Mart. 474,) is conclusive. In this case, Porter, J., says: "But when the record is looked into, we are met by the difficulty, that the defendant has not been cited as the law directs. The acts of the Legislature on this subject, require notice of the proceedings to be put up at certain places, and left at the last place of abode of the defendant. This stands in place of citation, and the want of it is fatal. Curia Phillip, p. 1, Sec. 12; Citation N. 1, 2. The statute must be construed strictly, as every law should be, that derogates so much from the general principles of our jurisprudence, and decides on the rights of those who are absent. It is a privilege to allow a creditor to pursue his debtor in this way, and he cannot complain if he is required to follow exactly the formalities which the act prescribes; and above all he cannot be per-

mitted to neglect that which the law has substituted for a citation, and is, consequently, the basis on which all the subsequent proceedings in the cause must rest.

"*It has occurred to the court, as a question worthy of examination, whether this objection was not removed; the attorney appointed by the court having plead to the merits. But I am of opinion, that the want of notice is not cured by this omission; the party alone could waive the defect.*"

And Mathews, J.: "I am clearly of opinion that the plaintiffs have not presented to the court a case in which an order of sequestration ought to have issued, *and that the error in granting such order is not cured by the neglect of the attorney appointed by the court to move for its reversal. There is nothing in the proceedings which can legally supply the place of notice to the defendants, by the ordinary mode of serving citation, and consequently they have never been properly brought in to answer, and cannot be bound by the acts of a person assuming the functions of their attorney by an illegal order of the court.* They have been condemned without having been heard, and however equitable the judgment may be in the present case, it is illegal and ought to be annulled."

Peyton and *I. W. Smith*, contra.

Simon, J. The grounds upon which we have deemed it advisable to grant a re-hearing in this cause, are two-fold. The appellants' counsel has contended, that we have erred, *first*, in deciding that the ground of nullity by him relied on against the judgment appealed from, should have been assigned as error by a written assignment, filed within ten days after the record was brought up; and *secondly*, in intimating that the nullity arising from want of citation, (if such be the fact,) was cured by the attorney appointed for the absent defendant pleading to the merits, without taking any exception to the want of citation.

I. On a further consideration of this point, we have been prompted to recognize, that our first impression was incorrect with regard to the non-existence of a statement of facts. This arose from the incomplete certificate of the clerk, who only certifies, that the transcript contains "all the proceedings and all the documents filed in the cause:" but the certificate of the Judge,

who declares, that "*the record contains all the evidence adduced by the parties on the trial of the cause,*" is a sufficient statement of facts; and we are aware that, under art. 897 of the Code of Practice, which says, that "the appellant *who does not rely, wholly or in part on a statement of facts,* an exception to the Judge's opinion, or special verdict to sustain his appeal, but on an error of law appearing on the face of the record, *shall be allowed to allege such error*, if, within ten days after the record is brought up, he files in the Supreme Court, a written paper stating specially such errors as he alleges, otherwise his appeal shall be rejected." There is no necessity for filing a formal or special assignment of errors, when the record contains a statement of facts upon which the appellant relies, either wholly or *in part.* So, in the case of *The State* v. *The Bank of Louisiana,* (5 Mart. N. S. 340,) this court said: "The Attorney General cannot complain that the assignment of error was filed too late; because his adversary was under no obligation of filing it at all, and may have the benefit of it without any, but *an oral assignment* at the hearing." In that case, there was a statement of facts, which enabled the court to act on the merits. And so in 1 La. 52; 6 Ib. 144, 157; 1 Rob. 460; 4 Ib. 147, 380; and 5 Ib. 169, the appeals were dismissed, because there were no statements of facts, and no assignments of errors had been filed, or been filed within the ten days.

We think, therefore, that the appellants in this case were not bound to assign errors, and that they were at liberty to point out the errors of law apparent on the face of the record, without their having been formally assigned. It is clear, that all the evidence adduced on the trial being before us, as also all the proceedings had in the cause, it cannot be presumed that anything has been left out; and that the party who complains of the judgment appealed from, being dispensed from the necessity of filing an assignment of errors, has a right to demand the nullity of said judgment, when said nullity is apparent on the face of the record itself. Code of Pract. art. 609.

II. We said in our first judgment, that "*no citation issued directed to the defendants at all;*" and this appears on the face of the record from the Sheriff's return, which recites that it was served on Thomas Slidell, Esq., in person; and from the return

of the same Sheriff on the writ of attachment, which he concluded by saying: "The defendant residing out of the State, I posted copies (thereof) at the door of the church and at that of the room in which this honorable court is held." Now, the law requires, in cases of attachment, that *the defendant should be served with a citation by affixing copies of the same, &c.*, on the door of the parish church of the place, or to that of the room where the court in which the suit is pending is held. Code of Pract. art. 254. Citation is the essential basis of all civil actions; (Code of Pract. art. 206,) and it has been often held, that the formalities prescribed by art. 254 of the Code of Practice, standing in the law of citation, the omission thereof must be fatal. 7 Mart. N. S. 160; 9 Ib. N. S. 351; 3 La. 18; 8 La. 587; 3 Rob. 233.

To this, however, the appellees' counsel has answered, that no exception was taken below to the want of citation; that the counsel appointed by the court to represent the absent defendants filed an answer to the merits, and permitted the case to go to final judgment without requiring proof of the service of the citation on the defendants in the manner prescribed by law, or making any objection to the Sheriff's return; and hence the questions occur: Is it too late for the counsel of the absent defendants to urge this objection on the appeal? And, if it be true, that the citation was not issued, or was not served according to law, was the attorney appointed competent to waive it?

On this point, we only expressed a doubt in our former opinion, whether, under the circumstances of the case, the appellants could be entitled to relief; but after a renewed and mature deliberation upon this subject, we have been constrained to come to the conclusion that the defendants were yet entitled to the benefit of the objection, as no one could waive it but themselves, or perhaps their regularly employed counsel authorized to appear for them. A similar question was presented for the solution of this court in the case of *Stockton et al. v. Hasluck et al.*, (10 Mart. 474,) and it was then held, that the party was not bound by the neglect of the attorney appointed by the court, to avail himself of the objection, or by his waiver resulting from an answer to the merits. "*It has occurred to the court,*" says Judge Porter, "*as a question worthy of examination, whether this ob-*

jection was removed; the attorney appointed by the court having pleaded to the merits; but I am of opinion that the want of notice is not cured by this omission; the party alone could waive the defect." In the case of *Hill et al.* v. *Barlow et al.* (6 Rob. 148,) we had occasion to investigate a question relative to the effect of an acknowledgment of service of the citation by a curator, *ad hoc*, appointed by the court, in relation to its interrupting prescription; and we held, that such curator *had no authority to waive the service of the citation*, and, by his voluntary act, to cause a legal interruption of the prescription. See also 13 La. 284; 17 La. 117. And in the case of *Hyde et al.* v. *Craddick*, (10 Rob. 393,) our language was: "But the record shows that Craddick has not answered personally, and is only represented by a curator, *ad hoc*, appointed by the court; and as said curator *cannot be permitted to waive any of the legal rights of the party he represents*, and above all, *as a judgment rendered in the absence of the interested parties, without their having been duly cited*, could never have any legal force and effect against them, we feel bound *to consider the exception, as if it had been originally and specially pleaded;* for our disregarding it would not give any greater force or validity to the judgment appealed from, if maintained on this ground, for want of a formal and special exception." So must it be in this cause; and the exception relied on must have the same effect now as if it had been specially pleaded below, previous to the attorney's answering to the merits.

With this view of the appellants' rights, and of the questions presented in their behalf, the judgment appealed from should, perhaps, be cancelled at once, and the suit dismissed; but as it is possible that, no exception having been taken below to the want of citation, the plaintiffs have not thought necessary to show that a regular citation had been posted up, together and at the same time with the writ of attachment according to law, and to call upon the Sheriff to produce it and amend his return, we think they should not be precluded from doing so; and that justice requires this case should be remanded to the court, *a qua*, for that purpose only.

It is, therefore, ordered and decreed, that this case be remanded

to the court, *a qua*, for the purpose only of giving the appellees an opportunity of proving the existence and regular service of a citation duly issued; that in case said citation exist and is shown to have been duly served, our first judgment be maintained, the costs of this appeal being borne by the appellees; but that, in case it turn out that the appellants have not been cited according to law, the judgment appealed from be avoided and reversed, and this suit dismissed with costs in both courts.

LOUIS ALLARD and others *v.* THE ORLEANS NAVIGATION COMPANY.

Defendants being authorized by their charter to construct a road on each side of a bayou, and to charge certain tolls thereon, contracted with plaintiffs for the construction of a road on one side, in consideration of conceding to them the tolls thereon for a certain number of years. Plaintiffs were to be at all the expense of the construction and repairs of the road, and, at the expiration of the time fixed on, it was to become the property of defendants. The contract was silent as to the right to make a road on the other side of the bayou. Defendants having constructed a road on the other side of the bayou, before the expiration of the time during which plaintiffs were to receive the tolls on the road constructed by them, an action was commenced by the latter for damages: *Held*, that to entitle plaintiffs to recover they must clearly establish a renunciation by the defendants of their right to construct a second road; and that it is not enough to make it public, that the right was intended to be renounced.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

MARTIN, J. The defendants are appellants, from a judgment by which they are condemned to heavy damages, in consequence of an alleged violation of a contract of theirs with the plaintiffs. By their charter, they are authorized to lay out and construct a toll road on each side of the bayou St. John. 3 Martin's Digest, 192. They did not avail themselves of this right, during the fourteen years which followed their incorporation. They then contracted with Allard for the construction of a road on the north side of the bayou, engaging to collect for him and at his expense, the tolls for all passages through the same, during twenty-two years, at the expiration of which the road was to become their property

absolutely, and without reimbursing to Allard any of the expenses attending its construction, or the repairs of it. They furthermore reserved the right of resuming the road, in case Allard did not punctually comply with the different conditions in the contract. Allard found it difficult to perform his obligations, and sought relief by ceding his contract to a company, reserving to himself some shares in the stock, and the defendants assisted him by taking an interest therein. Notwithstanding this, the defendants imagining that the public did not reap all the advantages, which had been contemplated by them, and the territorial Legislature, availed themselves of the authority which they had, to construct a road on the south side of the bayou. The plaintiffs have considered the construction of this road as a violation of the defendants' contract with them, and instituted the present suit to obtain damages therefor.

Their counsel have not pretended that the contract had transferred to them any right to a road on the south side; but they have contended, that there results, from the terms of the contract, a strong implication of the intention of the parties that the advantages which the plaintiffs were to receive from the road on the north side, should not be diminished or impaired by the construction of a road on the south side. They, indeed, urged that these advantages have been annihilated.

The First Judge thought that at the time of the contract, the task undertaken by Allard was considered by all as very difficult, and by many as completely impossible of execution, from the nature of the soil on which the road was to be made, through marshes and swamps, although experience has shown the easy practicability of such works; that the defendants were glad to ged rid of the burthen of constructing one road, by leaving it to Allard; that the new road being made higher than the first, the latter must have been overflowed and destroyed.

We do not see much force in these reasons. The ground on which Allard's road was to be built was so near the city, that it must have been quite as well known at the time of the contract as at present, it being the incessant resort of hunters and fishermen, and often visited by other inhabitants of the city and its environs; and Allard, whose plantation was contiguous thereto, must

have been as well acquainted with the nature of the soil over which the road was to pass as that of any part of his estate.

The grant of the authority to construct two roads, did not impose on the defendants the obligation of making either.

The overflow of Allard's road not being urged in the petition, cannot be considered as a proper ground for the judgment appealed from.

The right to the road on the south side, is not pretended by the plaintiffs to have passed to them. We must, therefore, conclude that it remained with the defendants. *Iniquum est perimi de pacto id de quo cogitatum non est.* Yet it is clear, that if it results from a correct interpretation of the contract, that this right was in the intention of both parties, to be suspended during the twenty-two years, for which Allard was to keep his road in repair, the plaintiff must be entitled to damages for the exercise of that right before the expiration of the time for which it had been renounced. But the party who seeks to avail himself of this renunciation, must clearly prove it. He must make it certain. It is not enough that he should make it probable. The defendants having sought, and the Legislature having granted a right to two roads, the presumption is strong, that the opinion of the grantees was that both roads would be profitable to them, and that of the Legislature that they were needed by the public. The defendants have shown, that they considered that the expenses of building and keeping in repair a second road, would be more than compensated by the receipt of the tolls which it would produce, notwithstanding the right of the plaintiffs to keep a road on the opposite shore in full activity; for otherwise, they would have spent their money uselessly.

From these considerations, we conclude that the First Judge erred in considering the alleged renunciation of the defendants to a road on the south side, as made certain, while it does not appear to us to have been made evidently probable.

It is, therefore, ordered, adjudged and decreed that the judgment be annulled and reversed, and that ours be for the defendants, with costs in both courts.

Denis and *Preston*, for the plaintiffs.

A. Hennen, for the appellants.

The Orleans Theatre Insurance Company v. Antoine Lafferanderie.

A contract by which one party grants to the other the use of a building for a certain period, in consideration of a sum paid in cash, and the execution of notes by the latter for a further sum, payable at different periods, the written instrument describing it as one of lease, is not a contract of sale, but of lease.

Whenever a remedy may be sought by action, the party entitled thereto, may avail himself of it by way of exception. C. C. 2042. C. P. 20.

Where a lessor, in an action for rent in arrear, causes the lease to be sold without observing the forms required by law, the lessee being thereby divested of possession by the tortious act of the lessor, will be released from any liability for rent accruing after the seizure.

Appeal from the Commercial Court of New Orleans, *Watts*, J.

Martin, J. The defendant is appellant from a judgment against him on three notes for $1000 each, payable on the 18th of February, May, and August, 1843, with interest and costs of protest. His defence is, that on the 29th of October, 1842, he rented from the plaintiffs the Orleans Ball Room, from that date until the 15th of October, 1843, for the sum of seven thousand dollars, and gave, in part payment of that sum, the three notes sued on; that on the 18th of March, 1843, the plaintiffs put an end to the lease by causing it to be seized, and afterwards sold, on a judgment which they had obtained for the rent theretofore due, and purchasing it at the sheriff's sale; that this sale was not legally made, not being preceded by an appraisement, and being for cash, instead of following the terms of the contract; that plaintiffs cannot avail themselves of it, as it was illegally made; and that, therefore, their possession of the premises under it was a tortious act, amounting to a breach of one of the principal conditions of the lease, to wit, that the lessors should permit the lessee to enjoy the premises until the expiration of the lease, or its dissolution in due form of law.

The contract was for the enjoyment of the premises between two fixed dates for a gross sum, of which a small part was paid in cash, and six notes were given, payable at different periods, during the continuance of the contract; and a clause was inserted, by which the plaintiffs stipulated that they should be authori-

zed to put an end to the possession of the defendant, on a violation of certain conditions therein expressed, without the defendant's being relieved thereby from the payment of his notes.

The plaintiffs' counsel has contended, that this was a contract of sale, by which the defendant bought the use of the premises during a fixed period, and for a gross sum. But we think differently. The character of the contract is expressly given us by the words selected by the parties thereto: "*La compagnie loue à bail,*" (the company lets and hires.) The defendant is referred to, throughout the contract, by the denomination of "*le preneur,*" (the lessee.) The price is stated to be that of the "*location,*" (lease,) and the contract is said to be one of "*bail;*" and the stipulation that the defendant should remain bound to pay his notes, although the plaintiffs turned him out of possession on the breach of certain conditions, repels the idea that the giving of the notes was an absolute payment, as this stipulation would then, have been entirely useless.

Lastly, the plaintiffs' counsel has strenuously urged, that the irregularity of their purchase, if any there be, cannot avail the defendant on his plea, but ought to have been set up in a direct action. We believe, however, that when a remedy may be sought by action, the party entitled thereto may avail himself of it by way of exception. Civ. Code, art. 2042. Code of Pract. art. 20.

The First Judge, in our opinion, erred in overruling the defendant's plea or exception. The tortious possession of the premises by the plaintiffs, having put an end to that of the defendant, the period of whose enjoyment is now expired, the consideration of the notes on which suit is brought, has failed by their act, and they cannot recover thereon. As to the rent anterior to the seizure, they have had judgment for it, and have enjoyed the premises from their purchase to the end of the lease.

It is, therefore, ordered, adjudged and decreed, that the judgment be annulled and reversed, and that ours be for the defendant, with costs in both courts.

St. Paul, for the plaintiffs.

Bodin, for the appellant.

Thomas Barrett *v.* His Creditors.

The letters of a party acknowledging that, in consideration of a certain sum, a third person had become jointly and equally interested with him in the purchase of real estate held in his name, and agreeing, for a fixed price, to convey to the same person one-half of his interest in a purchase of other lands, is evidence of a sale as between the parties, and the lands may be mortgaged by the purchaser, or subjected to legal mortgages as his property. *Per Curiam:* a sale, as between the parties, is complete as soon as there exists an agreement as to the object and the price, though the object be not delivered, nor the price paid, (C. C. 2413, 2431); the only formality required by law, as between the parties, is that the sale, when of immoveables, shall be in writing. C. C. 2415.

A promise to sell amounts to a sale, where there exists a reciprocal consent of both parties as to the thing and the price thereof. C. C. 2437.

An authority to sell real property and to apply the proceeds in a particular way, unexecuted at the time of a *cessio bonorum* by the principal, is revoked thereby.

Appeal from the Parish Court of New Orleans, *Maurian*, J.

Simon, J. This controversy arises out of certain oppositions made by divers judgment creditors of the insolvent, to an account, or provisional *tableau* of distribution filed by the syndic, which contains a statement of a special account rendered of the sum of $25,000, mentioned in said account as being in the hands of John Hagan to the credit of Barrett's estate, and partly distributed by allowing $2175 thereof to Sylvain Peyroux, or his assignees.

The opponents, to wit, The Union Bank of Louisiana, Christopher Adams, Isaac T. Preston, Thomas Wilson & Co., and Joseph V. Labarre, representing themselves to be judgment creditors of the insolvent for very large amounts, by virtue of judgments duly rendered against him, and regularly recorded in the office of the Recorder of Mortgages some time anterior to the declaration of insolvency, claim to be paid in preference to Sylvain Peyroux, or his assignees, out of the proceeds of certain lands situated in the rear of the city of New Orleans, and in the parish of Pointe Coupée, in the title to which, though in the name of John Hagan, the insolvent had an undivided interest which he surrendered to his creditors. They deny the right of preference allowed to Sylvain Peyroux, pray that said account or *tableau* may be amended, so as to reject Peyroux's claim, and place the oppo-

nents thereon according to the rank of their judicial mortgages as determined by the dates of the inscriptions of their judgments.

The Judge, *a quo*, rendered judgment against the opponents, overruling their oppositions and homologating the account filed, from which they took this appeal.

The facts of the case are these: It appears from the correspondence between John Hagan and Thomas Barrett that, as early as 1833, they intended to purchase jointly from the heirs of General Lafayette, certain tracts of land situated in Louisiana, in the rear of the city of New Orleans, and in the parish of Pointe Coupée. In a letter dated at Dublin, 18th of October, 1833, John Hagan writes to Barrett: "*The enclosed document will show that I have not neglected your wishes respecting the purchase from Sir J. Coghill, which when satisfied, you will consider for our joint accounts. I think the arrangement a very good and safe one for us,*" &c. In another letter dated at Liverpool, August 16th, 1836, John Hagan writes to Barrett: "*I have been anxiously waiting for an answer to my letter from Paris on the subject of the Lafayette purchase; however, from subsequent conversations with Geo. Lafayette, I do not think he is inclined to sell. I shall see him next month, and get his power of attorney to sell or divide the property, as I think it better for all our interests that either one or the other should be done, &c.*" In a subsequent letter, dated at Liverpool, September 27, 1836, John Hagan says: "*I am much disappointed, at not hearing from you on the subject of the Lafayette property. Mr. McCready is here, and says he came to Europe on purpose to have the titles made valid, that we may have no difficulty in conveying the property hereafter, &c.*" He further writes: "*When in Paris, a short time since, I purchased out the interests of the two sisters of Geo. Lafayette, say two-ninths at* 50,000 *for each, one-ninth payable either in New Orleans, on receipt of the deeds of sale, or in Paris prior to the* 1*st of May next, &c. Geo. Lafayette would not sell his interest, but will forward a power of attorney, to join us in a sale or division of the property, &c.*" In divers other letters written subsequently, John Hagan gives Barrett information in relation to the purchase, and to the titles from Coghill and Lafayette; and, in a letter dated at New Or-

leans, 27th April, 1837, John Hagan, finally says: "*In consideration of the sum of three thousand pounds sterling, I hereby acknowledge that you are half interested with me in the purchase of the Lafayette lands near the city and in the parish of Pointe Coupée, agreeably to the titles derived from Sir J. E. Coghill, and now in my name. I also agree to convey to you for the sum of* $10,000, *one-half of my interest in the purchase made from the heirs of the late Gen. Lafayette at Paris, say two-ninths of the property near the city, when my titles to the same are confirmed.*"

On the 11th of May, 1840, Barrett made a surrender of his property to his creditors; and among the property thus surrendered, he carried in his schedule, *his interest in the Lafayette property* in New Orleans and at Pointe Coupée, estimated at $250,000, which, he states, *is subject to judicial mortgages.*

The evidence further shows, that the recording of the opponents' judgments was anterior to the failure of Thomas Barrett; that, by notarial acts passed in November, 1838, and March, 1839, certain mortgages were executed by the insolvent in favor of Sylvain Peyroux, on divers pieces of real property and slaves, to secure a very large amount of endorsements furnished, or to be furnished, by the said Peyroux, for the benefit of Thomas Barrett, and that S. Peyroux appeared at the meeting of the insolvent's creditors; made a declaration under oath, of the sums due to him, and *accepted the surrender of the property*, without making any objection or reservation as to the statements carried in the schedule, or upon any other subject.

But it further appears (and this is the foundation of Peyroux's claim of preference,) that a certain act under private signature, purporting to have been executed by John Hagan on the 27th of April, 1837, was recorded on the 17th of May, 1842, in the words following, to wit: "*Thomas Barrett, having an interest with me of two-thirds of the property in the rear of the city of New Orleans, being the property known as the Lafayette Grant, or on Zimpel's plan as 'Suburb Hagan,' and also a further interest in said property of one-half of eight-ninths purchased of the heirs of Lafayette and paid for by Lewis Rogers, in consideration of which he became interested with Thomas Bar-*

ret and myself, to the extent of one-fifteenth of our eight-ninths; the remainder is owned jointly by myself and Thomas Barrett, as well as a tract of land in the parish of Pointe Coupée, containing about 4000 *acres, (all of these being purchases made by me of Sir Joshua E. Coghill and the heirs of Gen. Lafayette,) I hereby bind myself to pay over to Sylvain Peyroux, Esq., the proceeds of the sale of said lands, as far as the interest of T. Barrett is concerned, after deducting therefrom the amount of my advances for account of said Thomas Barrett, as well as a guaranty given to Lewis Rogers for* $40,000, *provided his fifteenth interest does not bring that amount. The property to be disposed of at public or private sale prior to the* 1*st of May*, 1841. *New Orleans, April* 27*th*, 1837, *John Hagan.*"

In addition to this evidence, certain testimony has been produced to show the real date of the act under private signature, which is proved to be in the hand-writing of one of the witnesses, who recognized it to have been written under the directions of Thomas Barrett, *and signed by John Hagan on the day next after its date*, and to have been delivered to Sylvain Peyroux on the same day, in the presence of said Barrett. The parol proof goes also to establish the reality of the debt due to Peyroux, the different payments made by him of divers notes which he had endorsed for the insolvent at different periods, beginning in the early part of the year 1838, and the repeated renewals of Barrett's notes, endorsed by Peyroux, and finally taken up by the latter at different times before and after the insolvency.

Under the issues presented by the pleadings, and the evidence adduced by the parties in support of their respective pretensions, it is clear, that their rights depend upon the solution of two questions: 1. Did Thomas Barrett ever acquire such a title to his interest in the Lafayette lands, as to subject his portion to the effect of the judicial mortgages recorded against him, and to enable him to surrender it to his creditors?

2. What is the extent and effect of the act under private signature executed by John Hagan, at the request of Thomas Barrett, in favor of S. Peyroux?

I. It cannot be controverted that the object of John Hagan, as by him expressed in his letters, from the origin of the speculation,

was, that the purchase of the Lafayette lands should be made for the joint concern and benefit of himself and Thomas Barrett; indeed his correspondence with the latter, shows that he was acting in the transaction as his agent, or *negotiorum gestor*, and that the title to the property intended to be acquired, was to be for their joint account. It it true, the business was carried on in the name of John Hagan; but the interest of the latter was limited to the portion pointed out in his letters, and it is obvious that the ownership of the lands, from the moment that John Hagan acquired his title thereto, was common to both himself and his partner, for whom he had acted, and with whose money the property had been paid for. This, Hagan fully acknowledged in his letter of the 27th of April, 1837, (of even date with the act under private signature, but anterior to the signing of the latter,) which recognizes a good and valuable consideration, (£3000 sterling,) and the extent of Barrett's interest in the purchase of the Lafayette lands, agreeably to the titles derived from Sir J. E. Coghill and *then, in his, Hagan's name;* and amounts also to a promise of sale for the sum of $10,000, of one-half of his, Hagan's, interest in the purchase made from the heirs of General Lafayette.

Now, it is one of the first principles of law, on the subject of sales, that a contract of that kind is considered *to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller*, as soon as there exists an agreement for the object, and for the price thereof, although the object had not yet been delivered, nor the payment made. Civ. Code, art. 2431. The property is of right acquired to the purchaser, that is to say, the ownership of the thing sold, which is the right by which it belongs to some one in particular, to the exclusion of all other persons; (Civ. Code, art. 480;) and a promise to sell amounts to a sale, where there exists a reciprocal consent of both parties, as to the thing and the price thereof. Civ. Code, art. 2437. The only formality that the law requires between the parties is, that a sale of immoveable property should be made in writing; (Civ. Code, art. 2415;) but the contract is perfect when three circumstances concur, to wit, the thing sold, the price, and the consent. Civ. Code, art. 2414. So, in 3 Mart. N. S. 337, this court held, that *a receipt of a vendor, acknowledging*

payment by vendee of a lot of ground, *is a good and valid sale.* In 1 La. 314, we said, that *evidence of the receipt of a sum of money* for a slave, and the promise to warrant the title, is a sufficient evidence of a sale, and that *the document which contains evidence of these two facts, is a bill of sale.* In 2 La. 460, we declared, that *a written promise to sell* or convey real property is valid, notwithstanding there be no signing or written assent by the promissee. In 3 La. 397, we held, that a contract by which *one joint proprietor conveys all his interest* in common property to another, for a given sum, *is a sale.* And in the case of *Long* v. *French*, 13 La. 231, we recognized the doctrine that *an agreement to sell a lot of ground, in which it is designated, and the price* and terms of payment *specified, is a specimen according to* art. 2431 of the Civ. Code, *and the seller is bound to execute a title accordingly.* Thus, it seems clear, that the essential requisites for the perfection of a legal contract of sale exist, and that the written acknowledgment and agreement of Hagan is, at least between the parties, a good title in favor of Barrett, and sufficient to transfer to him the ownership of his interest in the Lafayette lands. If so, his portion could be validly mortgaged, or made subject to the legal effect of judicial mortgages recorded against him, and his rights to the property so acquired, must have passed to his creditors by the surrender made thereof in May, 1840.

II. This act, which recognizes in its fullest extent the title of Thomas Barrett, and *absolute ownership in him* to the property therein described, is relied on as amounting at least to a transfer of the proceeds of the property which John Hagan was authorized to dispose of at a public or private sale, and the title to which, it has been urged, had always remained in the latter. It may have been executed with the knowledge and assent of Barrett, who, at that time, may have consented, (though the parol evidence of the fact is perhaps objectionable,) in contemplation of the sale of the property, that the proceeds of his portion should pass through the hands of Sylvain Peyroux, for certain purposes which are not expressed in the act; but how can it be contended that it is sufficient to vest Peyroux with the right of claiming said proceeds for his special benefit, and *as his*, when it is shown that

the property, not having been sold or disposed of before the failure, was subsequently surrendered by the owner thereof to his creditors. The authority of John Hagan to sell it had ceased; the title thereto became vested in the insolvent's creditors, who had, from the moment of the opening of the insolvency, acquired the right of dividing its proceeds between themselves according to the rank of their respective claims; and it seems that Peyroux himself considered it so, since he appeared at the meeting of the creditors, and *accepted the surrender*, such as it was, under the schedule, although the act which he now seeks to avail himself of, was then in his possession, had never been recorded, and was unknown to Barrett's creditors.

It has been conceded by the appellee's counsel, that the act under consideration is neither a pledge, nor a mortgage, nor a sale; but he has insisted, that the right of his client is indisputable, by virtue thereof, to claim the proceeds of the sale of the property, *as his*, under the transfer made to him, with the assent of Barrett, whose title to the lands was only inchoate and imperfect. Those proceeds were not in existence at the time of the act, and nothing shows that, if it was intended to be a transfer thereof to take effect at any subsequent period, any consideration was paid or given for it; none is stipulated in the instrument; and, indeed, we cannot infer from the evidence, that Barrett was then indebted to Peyroux in any such amount, as might be considered as a good and valuable consideration therefor. The testimony establishes the fact, that the latter had not endorsed for Barrett until nearly a year after. Two of the witnesses state, that Peyroux's endorsements first began about January, 1838, and the record shows, that in order to secure those endorsements, mortgages were executed by the insolvent in favor of Peyroux, in November, 1838, and March, 1839, corresponding exactly with the dates of the notes, and of their subsequent renewals. Hagan bound himself to pay the proceeds of the sale of Barrett's property to Peyroux, and nothing proves that at that time, *Barrett owed anything* to the promissee; the lands had not been sold; they were then *the property of Barrett in common with Hagan*; and whether Barrett assented to their proceeds being paid over to Peyroux or not, in the expectation of a sale thereof being subse-

quently effected, is immaterial, as we cannot at most view the act relied on in any other light, but as a mere voluntary mandate or power of attorney, on the part of Barrett, (who is not even a party to the act, and whose assent thereto is only proven *aliunde*,) authorizing Hagan to sell his undivided half of the property, and pay the proceeds to Peyroux, and empowering the latter to receive them, either as agent of the owner, or for purposes which have not been shown, and are not expressed in the instrument; and surely, such a mandate was revoked by the *cessio bonorum*, subsequently made by Barrett to his creditors. The fact that the act was recorded two years after the failure, cannot have any legal bearing on the rights of the parties, as it had ceased to have any effect, from the day of the declaration of insolvency; and as the mortgage rights which third persons had acquired upon the property, by virtue of the recording of their judgments, could not thereby be in any manner affected. We are of opinion, that the proceeds in controversy do not belong to Peyroux, who never had any legal right or title thereto in himself; and that they ought to be distributed between the insolvent's creditors according to their rank.

It is, therefore, ordered and decreed, that the judgment of the Parish Court be annulled and reversed; that the appellants' oppositions be sustained; and that the provisional *tableau* to which they were made, be so amended as to divide the sum in controversy between the opponents, according to the rank of their claims, based upon the dates of their judicial mortgages operating upon the property from which said sum has proceeded; and that this cause be remanded to the court, *a qua*, for that purpose; the appellee paying the costs of this appeal, and those of the oppositions in the lower court.*

Denis and *Preston*, for the appellants.

L. C. Duncan and *Roselius*, contra.

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* *Roselius*, for a re-hearing. The decision of this case, as the court observes, depends on the solution of two questions:

1. Did Thomas Barrett ever acquire such a title to his interest in the Lafayette lands, as to subject his portion to the effect of the judicial mortgages recorded against him; and to enable him to surrender it to his creditors?

2. What is the extent and effect of the act, under private signature, executed by John Hagan, at the request of Thomas Barrett, in favor of Sylvain Peyroux?

I. Whatever may have been the intention of Hagan and Barrett, in relation to the acquisition of the property which has given rise to this controversy, it cannot be contended, that the statements made by the former, in his letters to the latter, can be considered as vesting a title in Barrett. The only foundation for Barrett's title, is the letter dated New Orleans, 27th April, 1837. There is no doubt, that as between the parties, this is sufficient evidence of title in Barrett to the property purchased by Hagan of J. E. Coghill. But it is equally clear, that as regards the two-thirds of the land bought of the heirs of Lafayette, no title whatever was transferred to Barrett. With respect to this part of the property, it cannot be viewed in any other light, than as a mere proposal to sell, or pollicitation, and depending on an uncertain event, *i. e. the confirmation of Hagan's titles.* Nothing shows that Barrett ever assented to the proposition; nor is there a shadow of proof, that he paid or even agreed to pay, the price for which Hagan offered to sell it. It therefore does not constitute even a promise to sell, so as to affect the title; for there existed no *reciprocal consent of both parties*, as to the thing and the price. There was no mutuality of obligation, for Hagan could not have compelled Barrett to pay the price; and it is clear, that in synallagmatic contracts, both parties must be equally *bound* to comply with the obligations imposed on them. The judicial mortgages on which the claims of the opponents are founded, could not, consequently, operate on the property purchased by Hagan of the heirs of Lafayette. It has already been seen, that the only evidence of title in Barrett, to that part of the property acquired by Hagan of J. E. Coghill, is found in the letter dated New Orleans, 27th of April, 1837. This letter was never recorded, and can produce, of course, no effect, except as between the parties. But on the same date Hagan, at the instance of Barrett, executed the act under private signature, in favor of Sylvain Peyroux. *As there is no evidence to show whether the letter or the act under private signature, was written first*, they must be considered as simultaneous acts. [There is evidence showing which was written first. The parol evidence proves that the act under private signature, was signed by Hagan on the day next after its date,—thus, the letter was written first, and the title had passed. *Simon*, J.] And the question now arises, was there any necessity to record the act under private signature? If the evidence of Barrett's title had been recorded, it might well have been contended, that the transfer in favor of Peyroux could produce no legal effect against the creditors of Barrett, until it was likewise made public by being registered in the conveyance office. But *inasmuch as both these acts bear the same date*, and as it is not shown that the title was in Barrett, *for a single moment of time*, it is difficult to see how the opponents' judicial mortgages, could attach to the property in Barrett's hands. The second question, whether Barrett could surrender the property to his creditors, depends for its solution on the legal effect of the act under private signature in favor of Peyroux; for if that divested Barrett of his title, it would be idle to pretend that he could transfer it to his creditors.

II. The validity of the act under private signature is contested principally on the ground, that the consideration of the transfer is not mentioned. It is true, that the act is loosely drawn up; but it does not follow that a conveyance must be void, because the consideration is not set forth. On the contrary, even in the case where

a false consideration is mentioned in the act, it is still binding on the parties, if a real consideration be proved. The 1894th article of the Code is very explicit on this subject. It is as follows: "If the cause expressed in the consideration should be one that does not exist, yet the contract cannot be invalidated, if the party can show the existence of a true and sufficient consideration."

And in the case of the *Louisiana College* v. *Keller*, 10 La. 164, this court decided, that "an obligation is not the less binding, though its consideration or cause is not expressed." In the case now under consideration, the evidence abundantly establishes the consideration which Peyroux paid, for the transfer of Barrett's right to one-half of the proceeds of the sale of the property. It is objected, however, that the consideration was not paid, at the time the transfer was made. The intention of the parties evidently was to secure Peyroux against the liabilities which he was about to incur, by his endorsing Barrett's paper. Under this state of facts, the question is, whether such a transfer can legally be made, for the purpose of indemnifying a party for prospective endorsements? It is of little importance, so far as the decision of this question is concerned, whether the endorsements preceded the transfer, or were given afterwards. The Code provides in express terms, article 3259, that "a mortgage may be given for an obligation which has not yet risen into existence, as when a man grants a mortgage, by way of security for endorsements, which another promises to make for him." And the next article declares, that "the right of mortgage in this case, shall only be realized in so far as the promise shall be carried into effect by the person making it. The fulfilment of the promise, however, shall impart to the mortgage a retrospective effect to the time of the contract." Thus if this contract was a mortgage in form, no possible objection could be made to its validity. But it is said that it is neither a mortgage nor a sale. This objection is extremely technical. The intention of the contracting parties evidently was, to give a security for the endorsements which were to be given. It is generally immaterial, in what shape or form a contract is moulded, provided the object to be obtained be honest and legal. The exceptions to this general rule are few, and are confined to that class of contracts in which the form is considered as constituting an essential part of the contract itself, such as donations *inter vivos*, &c. This court lately decided, that the sale of real property to secure an endorser or security, was valid, not as a sale, but as a mortgage in disguise. So it has repeatedly been held by this court, and in France, that even a donation might be disguised under an onerous contract. Nay, in the case of *D'Orgenay et al.* v. *Droz*, 13 La. 383, it was decided, that a sale for a *fictitious* price, although not binding on the parties as such, still would be valid as a donation, if it contained nothing contrary to public order; provided the purchaser can receive a donation from the vendor, and no injury results to third persons. Here then the great principle which I invoke is fully recognized, that the intention of parties to contract, will not be defeated on mere technical objections as to the form of the act. Another rule of interpretation is, that an instrument should always be rather so construed, as to produce a legal effect, than to make it nugatory and inoperative. According to these legal principles, the transfer of Barrett's rights to the proceeds of the property in question to Peyroux, should be so interpreted as to carry into effect the intention of the parties.

Re-hearing refused.

CHARLES A. POOLE *v.* JAMES P. BROOKS and another.

Where one to whom interrogatories have been propounded under the 13th sect. of the act of 20 March, 1839, fails to answer within the delay fixed, such failure will, as in the case of a garnishee, be considered as a confession of his having property belonging to the debtor sufficient to satisfy the demand, and a final judgment may be rendered against him, on motion, without notice, for the amount of the demand, with interest and costs. C. P. 263. *Aliter*, where the party interrogated denies being indebted, and it is attempted to disprove his answers; in such a case an issue is joined, and the party must have an opportunity of being heard before he can be condemned.

A return by a marshal on an attachment, "that he had executed the writ by seizing in the hands of A. all sums of money, rights, credits, and property belonging to the defendant, to an amount sufficient to satisfy the debt," &c., is alone no evidence that any thing was actually seized.

APPEAL from the City Court of New Orleans, *Collens*, J.

Van Dalson and *Goold*, for the plaintiff.

McHenry, for the appellant.

MORPHY, J. This suit was commenced by attachment, in the name of Thomas P. White, to whose rights Charles A. Poole, the present plaintiff, was afterward subrogated. A judgment having been rendered therein, an execution was issued against the defendants, under which James R. Conway was made a garnishee, and interrogatories propounded to him pursuant to the statute of 1839, authorizing such a proceeding. On his failure to answer within the delay allowed by law, judgment was entered up against him, on plaintiff's motion, for the amount claimed, with interest and costs. From this judgment the garnishee took a suspensive appeal.

The appellant's counsel has made a variety of points, of which it is deemed necessary to notice only the following.

It is contended, that no final judgment could be given against the garnishee on an *ex parte* motion; that a rule to show cause should have been resorted to, or, at least, that the judgment, on his neglect to answer, should have been one by default, as on the failure of a defendant to answer in an ordinary suit. Art. 263 of the Code of Practice declares, that the garnishee's neglect or refusal to answer interrogatories propounded to him, shall be considered as a confession of his having in his hands property

belonging to the debtor sufficient to satisfy the demand of the plaintiff, and that judgment shall be rendered against him for the amount of such demand, with interest and costs. Such being the legal effect of the garnishee's neglect to answer interrogatories, no rule or notice to him is required before the rendition of the judgment, which follows as a necessary consequence. It is otherwise when the garnishee denies being indebted to the defendant, and his answers are sought to be disproved; in such a case, an issue is joined, and in the contest which arises thereupon, an opportunity must be allowed him of being heard before he is condemned, as was held in *Rockwell et al.* v. *Smith et al.* 1 La. 230. The judgment contemplated by art. 263 is, in our opinion, a final judgment, and not one by default, requiring for its confirmation the lapse of three judicial days, and proof to be adduced on the part of the plaintiff. Code of Pract. art. 312. On the confession of indebtedness, resulting from the garnishee's neglect to answer, the law authorizes against him a final judgment, in the same manner as against a defendant in an ordinary suit who should appear in court and admit the debt. Code of Pract. art. 263. B. & C's Dig. 458. 5 La. 83.

It is next urged, that a seizure was made under the attachment in the hands of the Sheriff of the Commercial Court, of property sufficient to satisfy the plaintiff's claim, and that until it is shown that the property thus seized has been legally disposed of, and has proved insufficient, no judgment can be, or should have been given against the appellant. The marshal's return on the writ of attachment says, "that he executed the within writ by seizing in the hands of E. Lasere, Sheriff of the Commercial Court, *all sums of money, rights, credits, and property* belonging to the defendants, to an amount sufficient to satisfy the debt," &c. This return furnishes no evidence that the defendants ever had any property in the hands of Lasere, or that any thing was seized. Such a vague and general seizure, when it is not followed up by interrogatories and the answers of a garnishee, showing what has been seized, proves nothing, and would be insufficient to bring into court an absent defendant under our attachment laws. It was, no doubt, intended to be followed by a garnishment; but the defendants made their appearance in court, and

pleaded to the merits, thus rendering superfluous any further proceeding under the writ of attachment.

In the other positions assumed by the appellant's counsel, he seems to have entirely lost sight of the law of 1839, providing for garnishment after a judgment has been rendered in a suit, and an execution is placed in the hands of the Sheriff.

Judgment affirmed.

FRANÇOIS PRALON, Syndic of the Creditors of Leon Pierre Aymard, *v.* LEON PIERRE AYMARD and others.

The holder of a negotiable note given for the price of property fraudulently sold by a debtor after obtaining a respite, cannot recover it, though taken before maturity, where the evidence shows that he was aware of the fraudulent character of the sale.

APPEAL from the District Court of the First District, *Buchanan*, J.

Biron, for the plaintiff.

Morel, for the appellant.

BULLARD, J. This is an action instituted by the syndic of an absconding insolvent, to annul certain contracts, alleged to be in fraud of his creditors, entered into by him after he had obtained a respite, and before the proceedings for a forced surrender, The contracts were annulled as fraudulent by a judgment of the District Court, but none of the original parties to those contracts have appealed. Michel, who became the holder of a note for $750, given in the execution of one of those contracts, has alone appealed, and insists, that he is a holder of the note in good faith, without any knowledge of the alleged fraud with which it is tainted, having received it in the usual course of business, and for a valuable consideration.*

The *bona fides* of Michel is thus the only question presented on this appeal. That question was decided against him by the court below, and he was considered by that court as having had such know-

* The note was taken by Michel before maturity.

ledge of the circumstances under which the note was given, as to identify him with the original transaction. It is clearly shown, that when the note was offered to him to be discounted, which was some time after the date of the mortgage, he took time to examine the act in the notary's office, with which it was identified by the *paraph* of the notary. It is difficult to suppose that Michel was entirely ignorant of the relations existing between the parties, and of the utter insolvency, if not of the absconding of Aymard. The insolvent proceedings were pending at the time Michel acquired the note. With this evidence before us, we are not prepared to say that the court below erred, in concluding that Michel took the note with notice of its true character.

Judgment affirmed.

François Pralon and others *v.* Leon Pierre Aymard.

Appeal from the District Court of the First District, *Buchanan*, J.

Biron, for the syndic.

Morel, for the appellant.

Bullard, J. The syndic took a rule upon certain purchasers at the sale of the insolvent's effects, to show cause why they should not pay the amount of their purchases, on suggesting that they had been authorized by a decree of the court to retain the same in their hands, subject to the further order of the court, upon a final *tableau*, they giving bond to contribute a *pro rata* to the law charges, privileges and mortgages which should be decreed to have the priority over their claims, and on alleging that said privileged claims were of such an amount as to require the defendants in the rule to pay the whole amount of their purchases, and that Michel and Saloy are not entitled to receive any thing on their claim against the insolvent.

Michel is appellant from a judgment making this rule absolute as to him.

It appears, that Michel purchased at the syndic's sale for $435, the slave, Agnes, who was mortgaged to secure the payment of the note for $750, in controversy in the case just decided, of

Pralon, Syndic, v. *Aymard et al.*, and gave security to pay the amount of the purchase, if the mortgage given to secure the note held by him should be declared null, and otherwise to contribute his share of the charges of administration.

The decision being against the appellant, as to the validity of his mortgage, it follows that he is bound to pay the amount of the purchase.

Judgment affirmed.

CHARLES STETSON and another *v.* THE FIRST MUNICIPALITY OF NEW ORLEANS.

No appeal will lie from a judgment dissolving an injunction obtained to restrain the levying of a tax, where the opposite party is required, as the condition of its dissolution, to give security for the reimbursement of any sum which may be paid by plaintiffs, in case there should be a judgment in their favor. The judgment is interlocutory, and does not work irreparable injury.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Elmore, W. W. King and *Grymes*, for the appellants. The judgment works an irreparable injury, and an appeal lies. *Hyde* v. *Jenkins*, 6 La. 435. *Mooney* v. *Hooper*, 3 La. 444. *Newell* v. *Morton*, 3 Rob. 103.

Soulé, for the defendants.

MARTIN, J. The plaintiffs are appellants from a judgment dissolving an injunction, which they had obtained to prevent the enforcing of an ordinance of the General Council laying a tax on steamboats navigating the river Mississippi. This injunction was applied for in a suit in which the constitutionality of the tax is questioned, and the reimbursement of such part of it as had been received by the defendants demanded. The dismissal of the appeal is prayed for, on the ground, that the judgment is an interlocutory one only, and does not work an irreparable injury.

The court before dissolving the injunction, required from the defendants a bond with security, for the indemnification of the plaintiffs in case the main judgment should be in their favor. Whatever injury the dissolution of the injunction may do to the

plaintiffs is clearly reparable by the final judgment, which will intervene in this case, if it allows the reimbursement of any money paid by them after the dissolution of the injunction; especially as the court has provided for the security of the plaintiffs by a bond with surety, of which they have not complained as being insufficient.

An interlocutory judgment dissolving an injunction to restrain the levying of a sum of money claimed as a tax from the applicant, is not of a different nature from one ordering the payment of a sum of money, or its being brought into court; yet we have refused to sustain appeals from such interlocutory judgments. 7 Mart. N. S. 54, 457.

Appeal dismissed.

Didier Dreux and others, Heirs of Claude Joseph Dubreuil Villars and Wife, *v.* Joseph M. Kennedy and others.

The provision of art. 43 of the Code of Practice, that a petitory action must be brought against the person in actual possession of the immoveable, does not contemplate that the person sued should have the right of possession. It is enough that he be the actual occupant.

The jurisdiction of a State, in civil cases, is co-extensive with its territory, except where it has consented to part with a portion of it, under the constitution of the United States; and it extends over every portion of its soil severed from the public domain.

Plaintiffs having instituted a petitory action against defendants to recover lands alleged to be in their possession, the latter excepted to answering the petition, and prayed for its dismissal, averring that the property is in the possession of the United States, a branch Mint having been erected theron; that they are merely officers of the Mint, and are not in possession of the premises, and have no authority to represent the United States; and that this action is an attempt to effect indirectly what plaintiffs could not do directly: *Held*, that the exception should be overruled. *Per Curiam:* Where the party in possession, sued in a petitory action, points out the owner under whom he holds, he is bound to defend the action, if such owner do not live within the State or is not represented therein, or if such proprietor, lessor or principal be the United States, against whom no direct action can be brought.

Appeal from the District Court of the First District, *Buchanan*, J. The petitioners represent that they are the heirs of Claude Joseph Dubreuil Villars and his wife, the latter of whom died

in the year 1750, and the former in the year 1757; that at the time of their death, their said ancestors were the owners and possessors of certain land in the parish of Orleans; that a war having broken out between England and France, of which latter country Louisiana was then and long afterwards a colony, the Governor and the *Commissaire Ordonnateur* of the Marine Department, possessing requisite authority for that purpose, caused possession to be taken of the said land, about the year 1759, under the pretext, that it was required for the erection of barracks, redoubts, and other military defences necessary to the defence of the city. Plaintiffs allege, that the right to take possession of the said property was asserted and exercised under a presumed, or express reservation, in all grants of colonial lands, empowering the King of France, and his colonial Governors, to resume the use of all such lands when necessary for the defence of the country; but that the right to take such property was subject to the condition, that when the necessity for using the land so taken ceased, or the authorities entrusted with the defence of the country abandoned it as no longer necessary, the land reverted to the original owners. Plaintiffs aver that the land thus taken without compensation by the colonial authorities, was occupied by a fort and other military defences at the time of the transfer of the colony to Spain, and, subsequently, in 1803, to the United States; and that the land, with the fortifications thereon, was transferred to the United States by the French government by the treaty of cession of Louisiana, subject to the obligations and conditions under which the French government held it. That the government of the United States having no longer any use for the military defences erected on the land, abandoned them about the year 1819, when, according to the laws of France, the laws of nations, and the second and third articles of the treaty of Paris, of 3d of April, 1803, between the United States and the French Republic, and various acts of Congress, the said land reverted to plaintiffs' ancestors. Plaintiffs further aver, that certain buildings called the Mint, have been erected on a portion of said lands; and that defendants are in possession thereof; and they pray, that the latter may be cited to answer, and be condemned to give plaintiffs possession of the land on which said buildings are pla-

ced, and to account for the rents and profits thereof, since 1819, or to pay one hundred thousand dollars in lieu thereof.

Defendants excepted to answering the petition, and prayed for its dismissal, averring that the land in dispute is in the possession of the United States, and occupied by buildings erected and used for a branch Mint; that the United States have been in possession thereof, since the year 1835, under a cession made to them by the corporation of New Orleans; that defendants are officers of the United States employed to carry on the operations of the Mint, and are not in possession thereof, and have no authority to take possession of said land, nor to defend this action. They further allege that plaintiffs, knowing the illegality of a direct action against the United States, have instituted this action to effect indirectly what they could not do directly. This exception, though in the names of the defendants, was signed, "Balie Peyton, United States Attorney for the Eastern District of Louisiana, and attorney of defendants."

Annexed to the exception was a copy of a notarial act executed by the Mayor, on behalf of the Corporation of New Orleans, by which the use of the land in dispute was ceded by the city to the United States, for the purpose of erecting a Mint thereon, on the condition that the right of the United States to the use thereof, should end whenever the property should cease to be used as a Mint. The act was accepted on behalf of the United States by Martin Gordon, who is described as a commissioner appointed by the United States to superintend the building of a branch of the Mint of the United States, to be located in New Orleans.

The act of cession by the city of New Orleans was offered in evidence on the trial of the exception, on the part of the defendants. It was proved by a witness introduced by them, that the land was occupied by the buildings of the Mint; that the defendants, as officers of the government, have the care of the buildings; and that the defendants, with the exception of one, reside thereon. The commissions of the defendants, as officers of the United States, were introduced in evidence.

There was a judgment below sustaining the exception, and dismissing the action, from which the plaintiffs appealed.

Schmidt, for the appellants. For the purpose of the present

controversy, the facts alleged by plaintiffs are taken as true. It is consequently admitted; 1st. That plaintiffs are the legal owners of the property claimed in their petition. 2d. That they have been illegally divested of their ownership; and 3d. That the land claimed, forms a portion of the territory of Louisiana, situated within the jurisdiction of the District Court of the First Judicial District.

The defendants contend:

1st. The United States own the land claimed by plaintiffs, by virtue of their title from the City of New Orleans.

2d. The United States are sovereign, and as such, not amenable to the jurisdiction of the State Courts.

But the defendants in the present suit, cannot rely on *personal exceptions*, which appertain to the *supposed real owner*, but which do not protect them individually from suits.

According to article 43, of the Code of Practice, the party really in possession must be made defendant in a petitory action, and he can only discharge himself by naming the real owner, who must defend the suit. The suit will not be dismissed upon defendant's naming the real owner, but the latter must be called in to contest the suit. *Kling* v. *Fisk*, 4 Mart. N. S. 393.

In the present suit, the United States have not been called in, nor have they voluntarily made themselves parties.

The defendants who possess no immunities which exempt them from being sued in the State Courts, cannot shield themselves under the supposed prerogative of the United States.

Were they permitted to do so, it could only be in consequence of a decision in favor of the United States, which this court can not pronounce in absence of the party whose rights are involved. Such a decision, if adverse to the pretended rights of the United States, would not be binding on them, because they were not parties.

The United States, supposing them to be parties, according to their own showing, have no title to the property claimed by plaintiffs.

Their title is an *act of donation, inter vivos*, from the Corporation of the City of New Orleans, which purports to transfer the land for the purpose of building the Mint upon it, and guaranties the use as long as used for the purpose of a Mint; the land to revert to the city, when it is no longer required for the purposes of the grant.

This conveyance constitutes the United States only *usufructuaries* of the land, for a period depending on the occurrence of a certain event. The *fee simple* is still in the Corporation, which has not parted with it. The doctrine contended for by the defendants in this case, amounts to this; that when *the reputed owner*

of real estate, temporarily transfers the use of such property to the United States, he cannot be sued for the ownership, because his tenant is the United States. The defendants have, consequently, no right to prevent us from attacking the Corporation through them. All that they can possibly have the right to insist on, is, that their usufructuary interest should not be interfered with.

I have hitherto supposed, that the title of the Corporation gave the United States some interest in the land claimed by plaintiffs, and entitled them to hold it, either as usufructuaries or otherwise; —but I contend, that the transfer of the Corporation, gave the United States no title whatever—

1st. From want of capacity in the donor.

2d. From want of acceptance of the donee.

I. The Corporation of New Orleans is not authorized by its charter, to alienate any portion of its real estate by donations as in the present case.

II. The donation was not accepted in due form. Gordon, who accepted it on behalf of the United States, was not authorized to do so. He was appointed the agent of the United States for the purpose of superintending the building of the Mint, and not to accept of donations. Civ. Code, arts. 1527, 1536, &c.

The United States have really no title whatever to the land on which the branch Mint is erected; and if they have not, does the mere possession, without title, authorize them to claim exemption from legal responsibility, not only for themselves, but for the subordinate agents who hold it for them, and who are in contemplation of law, mere trespassers? The prevailing doctrine, that the United States cannot be sued without their own assent, is inapplicable to the present case.

Every sovereign has exclusive jurisdiction over his own territory. Grotius de J. B. et P., b. 2, ch. 3, § 4, No. 3, vol. 2, p. 247. Vattel, vol. 1, p. 330. Martens, Droit des Gens, vol. 1, p. 178. Ib. vol. 2, p. 15. Wheaton's Law of Nations, pp. 98, 118. Story Confl. of Laws, p. 361, n. 3. *United States* v. *Crosby*, 7 Cr. 115, 116.

Louisiana is a sovereign State, and possesses, consequently, exclusive jurisdiction over her territory; but the land claimed by plaintiffs forms a part of that territory.

This reasoning is unanswerable; unless it be shown, that Louisiana has ceded to the United States such portion of her sovereign attributes, as will prevent her from asserting and exercising this right of jurisdiction against the United States.

The General Government is one of limited powers, derived from the grants of the States, while each State is sovereign in the most extensive acceptation of the term, and as such, possesses all

the attributes of sovereignty, of which it has not voluntarily divested itself.

The Constitution of the United States, art. 1, § 8, No. 16, declares, that the United States have *exclusive jurisdiction* over lands bought within the States, with the consent of their Legislatures, for the purposes of forts, dockyards, arsenals, &c. This is the only constitutional provision in relation to the subject, and if it can be shown, that the lands claimed by the plaintiffs have been acquired by the United States, for the purposes mentioned in the preceding provision, and that the Legislature of the State has given its assent to the acquisition, there would perhaps be some pretext for the pretensions of the defendants, though, even in such a case, it would not be tenable.

In the *United States* v. *Bevans*, 3 Wheat. 336, the Supreme Court of the United States declare, that the jurisdiction of a State is co-extensive with its territory, co-extensive with its legislative power, and that, without the consent of the Legislature where the land is situated, the United States have no jurisdiction over it. This doctrine is re-asserted in *The People* v. *Godfrey*, 17 Johns. R. 232. The jurisdiction, therefore, appertains to the State.

But, say our opponents, admitting your doctrine to be true, how is the jurisdiction to be exercised, since *no suit can be brought against the United States*?

The answer is simple. The United States, whenever its rights come in conflict with the acknowledged prerogatives of the State within its own territory, must be regarded as a *foreign sovereign*, who, according to the authority already cited from Martens' Law of Nations, is subject to the jurisdiction of the sovereign, within whose territory it owns property, as to such property.

It is true, that Chancellor Kent asserts in his Commentaries, "that the United States cannot be sued;" but that learned jurist gives us at the same time the authority on which he relies to establish his assertion, and it is to that authority we must look, in order to ascertain the extent of its obligatory force. It rests entirely on an *obiter dictum* of Chief Justice Marshall in the case of *Cohens* v. *The State of Virginia*, (6 Wheat. 264;) which *dictum*, though entirely unnecessary to the decision of the cause, is pressed much beyond its reasonable and obvious import, and then relied on as conclusive authority. This *dictum* is no authority. See Chief Justice Marshall's commentary in the above case. But, giving it all the weight which can be claimed, it will be found that it asserts only, *that the United States cannot be sued in their own courts*, and consequently does not affect the present question.

The language of the Chief Justice is: "The universally re-

ceived opinion is, that no suit can be commenced and prosecuted against the United States; that the judiciary act does not authorize such suits." This language, one would suppose, was sufficiently guarded, since the Judge does not even intimate his own opinion, and qualifies the prevailing opinion by reference to the judiciary act, which applies exclusively to the tribunals of the United States. All that the Chief Justice meant to say, was, that under the acts of Congress, as they stand, the United States cannot be made defendants in their own courts. That Congress has the power to authorize suits against the United States, does not admit of doubt, since the power has been repeatedly exercised. The immunity of the United States from suits, therefore, if it exists at all, cannot arise from any inherent prerogative in sovereigns, but simply from the omission of the Legislature to prescribe the manner in which suits of this nature are to be prosecuted.

All that can reasonably be inferred from this *dictum*, as well as from that of Justice Thompson in *The United States* v. *Ringgold*, (8 Pet. 150,) and of Justice Wayne in *The United States* v. *The Bank of The Metropolis*, 15 Pet. 392, which maintain the same opinion, *arguendo*, and by way of illustration, is, therefore, that the United States courts are not authorized by law to entertain suits against the United States.

To suppose that these *obiter dicta* were intended to impair or annul the decisions of the "oracles of universal law," which all courts are bound to respect, as well as the authoritative adjudications of the same tribunal already quoted, would be absurd.

Let us, however, suppose for a moment, that the defendants' position, that the United States cannot be sued, is true; would this better their position, or authorize the dismissal of this suit? Certainly not.

In the case of *Osborn* v. *The Bank of the United States*, 9 Wheat. 738, the Supreme Court determined, that where the principal is above the law, the agent must, from the necessity of the case, and to prevent a failure of justice, be made a party.

Chief Justice Marshall, who delivered the opinion of the court in that case, says: "But if the person who is the real principal, the person who is the true source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say, that the law could not afford the same remedies against the agent employed in doing the wrong, which they would afford against him, could his principal be joined in the suit." And again: "*The universally received construction in this case is, that jurisdiction is neither given nor ousted by the parties concerned in interest, but by the relative situation of the parties named on the record.*" If, therefore, the United

States cannot be sued, this fact would be sufficient of itself to prevent the court from dismissing the suit, and induce it to retain its jurisdiction.

Nay, the Supreme Court of the United States have admitted, that the jurisdiction of the State over the real property within its territorial limits, gives it the power to tax such property, even though it belong to the United States. *McCulloch* v. *The State of Maryland*, 4 Wheat. 316. And if it has this authority, it can only be because it is a portion of the sovereign attributes of the State. The power to tax, implies the right of enforcing the payment of the tax, and if a suit should become necessary for that purpose, the United States could not prevent the State courts from taking cognizance of the same, on the pretext that they cannot be sued. If this be so, what valid reason can be assigned to prevent the State courts in this case, where the title to the land is in dispute, from maintaining their jurisdiction?

What is the situation of the State and the United States, as to the land in dispute?

It is within the territorial limits of the State, and you may consider the United States either as usufructuaries, or owners of the land. The United States, a sovereign, possesses then, within the territorial limits of Louisiana, another sovereign, certain lands; and the question is, can the former claim exemption from the territorial jurisdiction of the latter?

To this question, a negative answer must necessarily be given, unless it can be shown, that the State has consented to exempt the United States from this jurisdiction. But of this there is no proof; the jurisdiction, therefore, remains unquestionable.

History furnishes innumerable examples of the fact, that one sovereign, though paramount and absolute within his own dominions, might be, as to lands held within another sovereignty, the mere vassal of such sovereign, and subject to his jurisdiction. *Vide* Ward's Inquiry into the Foundation and History of the Law of Nations, vol. 1, p. 220, *et seq.*

That a sovereign does, on some occasions, divest himself of the attributes of sovereignty, and thus renders himself liable to be treated as an ordinary individual, see *Bank of the United States* v. *The Planters Bank of Georgia*, 9 Wheat. 904.

So, in the present case, the State of Louisiana having exclusive jurisdiction over the land, she cannot allow the United States any exemptions, without impairing her own rights.

Besides, the court will perceive by the decision of the Pea Patch case, that the possession of the United States forms really no obstacle to the trying of the title.

Downs, Attorney of the United States for the District of Louisiana, contra. The property claimed belongs to the United

States, and they are in possession of it in the only way they can possess anything, by their officers. Civ. Code, arts. 3389, 3395, 3401, 3403. *Ellis* v. *Provost et al.* 13 La. 232.

But it is contended that, the United States are not in possession as owners, but as usufructuaries. If this were the fact, it could not avail the plaintiffs on the exception now pending, in which the title is not involved, but only the *suability* of the United States. But it is not a fact that the United States possess the usufruct and nothing else. They hold under a full conveyance with a *resolutory* or *dissolving* condition. Civ. Code, arts. 525, 603, 2544, 2413, 2040, 2016.

Can the United States, then, be sued in any court? See Const. of the United States, art. 3, sec. 2. 3 Story's Comm. Const. 538 to 542. 1 Kent, 295, 297 in note. Sergeant's Const. Law, 109. *Chisholm* v. *State of Georgia*, 2 Dallas, 427 to 440, 442, 445, 460, 475, 478. *Hollinsworth* v. *Virginia*, 1798, 1 Cond. R. 169. 3 Dallas, 338. 1 Tucker's Black. part 11, 242. Ib. part 1, 352. 2 Cond. R. 442, 320, 277. Acts of Congress, 1844, p. 53. 3 Story's Laws United States, 1959, acts of 1824. 7 Mart. 632. 2 La. 203. 3 Rob. 373. 3 Hall's Law Journal, 129.

If the United States cannot be sued in their own courts, *a fortiori*, they cannot be sued in the State courts. See authorities above cited and also Federalist, Nos. 13, 33, 39, 80. Madison Papers. Elliot's Debates.

The case of *Wilcox* v. *Jackson*, 13 Peters, 498, is not at all in conflict with these authorities. No objection was made to the jurisdiction; it was an *agreed* case, submitted to the court by the officer Wilcox, and the government, voluntarily, in order to have the decision on the merits. In that case it is said, p. 507: "It *is agreed*, that if the court should be of opinion upon the hearing of the cause, that the law of the case is with the plaintiff, (defendant in error) a judgment *shall be rendered*, that he recover his term aforesaid, and *that he have his writ of possession*, &c., and that judgment be *rendered against the defendant*, and in favor of the plaintiff, for the use of the said lessor for the amount of the rents and profits in the said plaintiff's declaration, mentioned together with his costs."

The celebrated case of the Pea Patch is still less in point. That was an action of ejectment brought in the Circuit Court of the United States for the New Jersey District, returnable at the October term, 1833, by *Henry Gale* v. *Henry Bealing and others*. See Senate Documents, vol. 3, for 1837, 1838, No. 140, p. 25. See charge of the court, p. 38. Nothing shows that any exception was taken to the jurisdiction of the court. On the 25th May,

1840, the President submitted the correspondence on the subject of the Pea Patch tot he Senate. See Senate Documents 1839–40, vol. 7, No. 501. See pp. 2, 8, 9, for the opinion of the Solicitor of the Treasury, as to the necessity of some act of Congress to bind the United States to abide the event of the trial. It will also be seen from this correspondence, that a judgment was obtained by the United States in the Circuit Court of Delaware, subsequently to the ejectment case in New Jersey, for the Pea Patch; and that instructions were given, in the event of any interference by the heirs of Gale, that the District Attorney should obtain a writ of *habere facias possessionem*. On the 7th June, 1842, (Executive Documents for 1841–42, vol. 5, No. 241,) the Secretary of War submitted a contract between the heirs of Gale and himself, to Congress, the object of which was to quiet the title of the United States. The Appropriation Act of 1844, appropriates $20,000 for the repairs of Fort Delaware, *provided* the title to the Pea Patch shall be *decided* to be in the United States: so, that the judgment rendered many years since, when no objection was taken to suing the officer of the United States, was considered null and void, and an agreement was made to refer it to arbitration; and as far as we can ascertain, in 1844, it was not settled, and, perhaps, is not so yet. This certainly could not have been the case, if the judgment against Henry Bealing had been binding on the United States, or had been valid.

The case of *Stokes et al.* v. *The Post Master General*, was an application by the plaintiffs to the Circuit Court of the United States for the District of Columbia. The plaintiffs applied to Congress for relief against the Post Master General, who had struck from the account of the plaintiffs certain credits which had been allowed by his predecessor. An act was passed, directing the Post Master General to pass to the credit of plaintiffs, such sums as the Solicitor of the Treasury should determine they were entitled to. The Solicitor informed the Post Master General, that certain claims of the plaintiffs were well founded, but the Post Master General refused to allow the credits. Application was again made by the plaintiffs to Congress, and the Senate determined, that no farther legislation on the subject was necessary. Whereupon the plaintiffs applied to the Circuit Court for a *mandamus* to compel the Post Master General to credit them with the sums decided by the Solicitor to be due to them. The *mandamus* was granted, and the Post Master General appealed. The Supreme Court affirmed the judgment of the Circuit Court. They say: "We do not think the proceeding in this case interferes, in any respect whatever, with the rights and duties of the Executive; or that it involves a conflict of powers between the

executive and judicial departments of the government. The *mandamus* does not seek to direct or control the Post Master General in the discharge of his official duties, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act, which neither he nor the President had any authority to deny or control. The right of the plaintiff to the full amount of the credit, according to the report of the Solicitor of the Treasury, having been ascertained and fixed by law, the enforcement of that right falls properly within the judicial cognizance."

But if this suit had been brought against the Post Master General, without the action of Congress for a liquidation of his accounts, the case would have been different, and the court would have had no jurisdiction.

Moise, on the same side. Art. 43 of the Code of Practice requires, that the petitory action should be brought against the party in possession, and if such party be a lessee, he shall name his lessor, and be dismissed from the suit; the defendants are lessees. The occupancy of the buildings is allowed as part consideration for their official services. They have named their lessors, and ought to be dismissed. The cases of *Kling* v. *Fisk*, 4 Mart. N. S. 391, and *Bayaujohn's Heirs* v. *Criswell*, cited by plaintiff's counsel, were under the old Code. See Code of 1808, p. 275, art. 25. So, in the case of *Plummer* v. *Schlatre*, 4 Rob. 29, the court held, that art. 43 of the Code of Practice did not apply, because the lessor lived out of the State. Do the United States reside out of the State?

That "a sovereign, as such, has no immunity from suit as to lands within the territory of another, and a foreign sovereign," is not disputed. For the purposes of this argument that position is conceded. But the true issue here is: Is the sovereignty of the United States a foreign sovereignty as to Louisiana? If not, then the United States can no more be brought to the bar of our State tribunals, than can the State of Louisiana.

This exception has been argued as though it were a question of conflict of jurisdiction between the State and federal tribunals. And it has been urged that, inasmuch as the jurisdiction of Louisiana is co-extensive with her territory, except in places *ceded*, and as this land has not been ceded, she has jurisdiction over it. Nobody doubts this. If a crime be committed on the land in controversy, the offender will have justice meted out to him by the State courts. But the real matter in hand is not as to the jurisdiction of the State court over the *subject matter*, or *over the place*, but as to its jurisdiction over the *party*. Can the United States be made a party defendant in the courts of Louisi-

ana, whether the suit involves personal property, real property, or any thing else?

Wilcox v. *Jackson*, 13 Peters, 499, was an agreed case. But it is said, that no agreement of parties can give jurisdiction. Certainly not, if the court has no jurisdiction by reason of the *subject matter* of the controversy. But where the limitation of the jurisdiction depends on something *personal to the parties*, an appearance and answer *will* give jurisdiction. *Dupuy* v. *Griffon's Ex'rs.* 1 Mart. N. S. 200. *Flower* v. *Hagan et al.* 2 La. 224.

The cases and authorities relied on as illustrative of the positions taken are: 1 Blackstone, 243. *Schooner Exchange*, 2 Cond. Rep. 439. *Orleans Navigation Co.* v. *Schooner Amelia*, 7 Mart. 633. *Cohens* v. *Virginia*, 6 Wheaton, 264. *United States* v. *Ringold*, 8 Peters, 163. *United States* v. *Barney*, 3 Hall's Am. Law Journ. 139. *Chisholm* v. *State of Georgia*, 2 Dall. 414; and the opinions of Cushing, p. 469; of Jay, Chief Justice, p. 478; and argument of Randolph, Attorney General, p. 425. 1 Kent, 297, *note*. Sergeant's Const. Law. 109. 3 Story's Commentaries on the Const. 538. *McCluny* v. *Silliman*, 6 Wheaton, 298.

Bullard, J. The plaintiffs, who represent themselves to be the heirs of Claude Joseph Dubreuil Villars, assert title to a lot of ground in the city of New Orleans, on which the branch Mint of the United States is built; and this action is brought against several persons in the actual occupancy of the property, who excepted to the petition, making them parties, on the grounds: 1st. That it appears from the petition that the United States are in *possession* of the square of ground for which the suit is brought, and that the respondents cannot be called on to defend the said suit. 2d. That, in point of fact, the square of ground is wholly employed and in possession of the United States, for the purposes of a branch Mint, and all the buildings erected thereon were built, and have been ever since possessed by the United States, for that purpose, and its necessary appendages. That they have thus possessed since 1835, in virtue of a cession made to them by the Corporation of New Orleans. That the respondents are officers of the Mint, and are not in possession thereof, and are without authority to take possession of said square, or to represent the United States, in defending this suit. 3d. That the plaintiffs, well knowing the illegality of an action instituted directly against the United States, have brought this action against the respon-

dents in order to effect indirectly, what would be illegal, if directly done. On these grounds they pray to be dismissed.

The defendants exhibited their commissions as officers of the branch Mint of the United States, and a copy of the contract between the city and the Government, relating to the use of the lot for that purpose. The exceptions are signed by the District Attorney of the United States.

The District Court being of opinion, that, under art. 43 of the Code of Practice, such an action must be brought against the person actually *in possession*, although he be the farmer or lessee, and that the defendants having disclaimed title, and shown that the possession is in the government, which cannot be sued, and that those officers do not come within the provisions of the 43d article, sustained the plea, and the plaintiffs appealed.

The question which the case presents may be regarded in a two-fold light: *First*, as it relates to the technical objection arising out of the 43d article of the Code of Practice relating to the petitory action; and *secondly*, as to the objection that the United States are substantially parties in interest, and are not amenable to the jurisdiction of the State courts as parties defendant.

I. The article of the Code relied on, requires the petitory action to be brought against the person who is in the *actual possession* of the immoveable, even if the person having the possession, be only the farmer or lessee. Much stress has been laid upon the word *possession*, as if the person sued must have a right of possession in himself; and yet a farmer or lessee, who may be sued in the first instance, has only the occupancy, and his possession is that of the owner. This construction is fortified by the consideration that in the French text the word *détenteur*, which is equivalent to occupant, is used. Hence the same article requires, that when the farmer or lessee thus sued, declares the name and residence of his lessor, he shall be made a party, *if he reside in the State or be represented therein;* and we held in *Plummer* v. *Schlatre*, (4 Rob. 29,) that this expression implies that, if such lessor reside out of the State and be not represented therein, the lessee shall take upon himself to defend the suit in the absence of the owner of the property. According to these principles, if the exception in the present case had disclosed the

fact that the defendants held under a foreign corporation, not represented in the State, we should be of opinion that they had the faculty *standi in judicio*, in relation to the title.

The question, whether the action of revendication could be brought against one who possessed in the name of another, appears to have been controverted among the Roman jurists. The Proculians maintained the negative, but Ulpian holds the opinion, that it may be maintained against those who are in possession, in whatever manner, or by whatever titles they possess. "*Puto autem ab omnibus qui tenent et habent restituendi facultatem peti posse.*" L. 9, ff, De loci vend. According to Pothier, the French law allowed the action to be brought against any occupant, but if he declares he possesses as tenant, or lessee of another, the person under whom he holds ought to be cited, for says he: "the question of title to the thing sued for, cannot be discussed nor decided with the farmer or tenant, who does not pretend to the ownership: it can only be so with him who possesses the estate by his tenant, who in quality of possessor is its presumed owner until the plaintiff in the action of revendication establishes his right." Droit de Domaine de Propriété, No. 298, (vol. S, Paris ed. 1827.)

The Code of Practice has adopted a middle course, and requires the farmer or tenant to be dismissed, and the owner for whom he possesses to be made a party, when he resides in the State, or is duly represented.

II. This leads us to inquire secondly, whether the action can be proceeded in, when the parties in possession disclose, as the owner under whom they hold, the United States, who cannot be sued, but who are evidently parties in interest.

It is quite clear, that the United States cannot be sued in any court as a party defendant on the record; but it appears settled that in the other States, actions may be brought and maintained against public officers, when the government alone is a party in interest; and this is particularly the case in actions of ejectment. In the opinion of the Supreme Court of the United States in the case of *Wilcox* v. *Jackson*, to which we shall have occasion to recur again for a different purpose, it is said by Mr. Justice Barbour: "This then being the case, and this suit having been *in*

effect against the United States, to hold that the party could recover *as to them*, would be to hold that a party having an inchoate and imperfect title, could recover against one in whom resided the perfect title."

Thus the decision of that case, which was an ejectment against an officer of the army holding under the the United States, turned upon this distinction; that, although by the law of Illinois a certificate of purchase and a patent certificate, without a patent, (inchoate titles,) were sufficient to maintain an action of ejectment in relation to lands severed from the domain, and in ordinary cases, yet when the action is against one holding under the United States, and the government is substantially a party in interest, a recovery could not be had without a patent; and the plaintiffs failed because no patent had ever issued, and the legal title was in the United States. In that case the judgment in the State court was for the plaintiffs, and the United States, regarding their officer as a mere nominal party, prosecuted the writ of error themselves. No question was made as to the form of the action. The court held that "whenever the question in any court, State or Federal, is, whether a title to land which had been once the property of the United States has passed, that question must be solved by the laws of the United States; but that whenever, according to those laws, the title shall have passed, then that property, like all other property in the State is subject to State legislation; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." 13 Peters, 498.

The rule which governs actions of ejectment at common law appears to be, that after service of the ejectment, which is upon the tenant in possession, the defendant should, in case he means to defend the title, appear and confess lease, entry and ouster, which brings the title only into issue. Where the tenant has not given notice to his landlord, which he is bound to do in England under severe penalties, and there is judgment against the casual ejector, the court will set aside the judgment on the landlord's entering into the usual rule to try the title; or the landlord may bring a writ of error, which will be a *supersedeas* of the proceedings. Espinasse's Nisi Prius, 443.

That the jurisdiction of a State is co-extensive with its territory and its legislation, except where it has consented to part with any portion of it under the constitution of the United States, is a proposition which cannot be combated. It applies to every portion of its soil, which has been severed from the public domain. 17 Johnson, 233. Sergeants' Constitutional Law, 266. 13 Peters, *loco citato.* 2 Mason, 60.

In the case of an illegal taking of property by an officer acting under the authority of the United States, and for the use and benefit of the government, we do not doubt but that an action would lie against the officer, or agent, of the United States, although the party in interest would be the United States. In such cases, jurisdiction is neither given nor ousted by the parties concerned in interest, but by the relative situation of the parties named on the record. "If," says the court in *Osborn* v. *The Bank of the United States*, "the person who is the real principal, the person who is the real source of the mischief, by whose power and for whose advantage it is done, be himself above the law, be exempt from all judicial process, it would be subversive of the best established principles to say, that the law could not afford the same remedies against the agents employed in doing the wrong which they would afford against him, could his principal be joined in the suit." 9 Wheaton, 738. In the case of *Stokes et al.* v. *The Post Master General*, that officer had no personal interest in the matter, and the amount to be allowed was to be paid out of the treasury of the United States.

Upon the whole we conclude, that, if, when the party in possession, who is sued in such an action points out the owner under whom he holds, he is bound to defend the action, if such owner does not live in the State, and is not represented in it; still more should he so, when such proprietor, lessor or principal is the United States, against whom no direct action can be brought. If it were not so, the clearest right might be defeated, and the party suing be without remedy. The court, therefore, in our opinion erred in sustaining the exceptions.

It is, therefore, ordered and decreed, that the judgment of the District Court be reversed, and it is further ordered, that the exceptions be overruled, and the case remanded for further proceed-

ings according to law, and that the defendants pay the costs of the appeal.*

* *Downs*, for a re-hearing. The judgment of this court concedes, that if the possessor, or occupant of land be sued in a petitory action, he shall be discharged from the suit, if he name the party under whom he holds, provided such party resides, or is represented in the State. The defendants say they occupy, or possess the land merely as officers of the United States, and it is submitted that the United States are fully represented in the State of Louisiana. The 35th section of the act of 1789 (Story's Laws, p. 67, chap. 20,) requires the District Attorney to "prosecute all civil actions in which the United States are concerned." This act does not restrict the District Attorney to cases in which the United States are plaintiffs, but extends his duty to "all civil actions in which the United States *are concerned*." It is true, the act uses the word "prosecute," yet the uniform construction, and invariable practice have been, to require the District Attorneys to appear in all suits in which the United States are interested. They intervene in every case in which the United States have an interest, and their acts are ever regarded as obligatory upon the government. They are always cited by the special orders of the courts if the rights of the United States seem to be involved in the matter in controversy, and admissions made by them during the trial of a cause, are considered binding upon the United States. Besides, the act of 29th of May, 1830, sect. 7. (Story's Laws, vol. 4. p. 2207,) requires the Solicitor of the Treasury to instruct the District Attorneys "*in all matters and proceedings appertaining to suits in which the United States are a party interested.*" It is, therefore, submitted, that the District Attorney for the District of Louisiana is authorized by law to represent the United States in all judicial proceedings in the State of Louisiana, and that the defendants should be dismissed from this suit.

But have the United States a residence? and if they have, is it in the State, or out of the State? The United States are sovereign. If in popular governments, where the sovereignty is in the people, any residence can be predicated of the sovereign, it must be co-extensive with the territory over which the powers of sovereignty are exercised. It follows, that the United States reside as much in Louisiana as they do any where else. Therefore, as the United States reside in Louisiana, defendants should be discharged.

Although the arguments based on the 43d art. of the Code of Practice are regarded as technical, they are not, on that account, less worthy the attention of the court. Technical rules are intended for the simplification of judicial proceedings, and to promote the proper administration of the laws. The rule that dismisses the lessee, or occupant, from the petitory action seems to exist in all systems, and is founded in wisdom. The mere lessee has no interest in defending the suit, and is indifferent to the proof which the plaintiff may make of his title. Plaintiff's evidence of ownership may be defective, but the lessee failing to criticize and expose it, judgment is rendered for the plaintiff, he is placed in possession while the claimant who was before in the lawful possession, would thereafter, in *his* action, be compelled to rely upon the strength of his own title, instead of the weakness of his adversary's.

If the United States were to come in, and offer to defend this suit, the court would certainly permit them to do so. If then they may come in and plead to the merits, why may they not except to the jurisdiction? The court erred in regarding the United States merely as a party interested. The United States are substantially the party sued. If, by their voluntary appearance, the nominal defendants would be dismissed, then the United States are the real parties defendant, though not named in the record: and the judgment says, "it is quite clear that the United States cannot be sued in a direct action." In the case of *Wilcox* v. *Jackson*, no exception was taken to the jurisdiction of the court, and as the want of jurisdiction was by reason of something personal to the party who had the right to make it, an appearance and answer gave jurisdiction. The fact that there are no cases to be found in which suit has been instituted against the United States, either in a personal or a petitory action, directly or indirectly, goes far to show that no action can be maintained against them. The Fort Dearborn and the Pea Patch cases are the only exceptions to what has been stated, and in neither of these was there a plea to the jurisdiction.

A distinction is taken by the court as to its jurisdiction in actions of this nature, over land severed from the public domain, and land that has not been so severed. The cases from 2 Mason and 17 Johnson, cited by the court in support of this distinction, illustrate an entirely different principle. It is not disputed, that all offences committed upon any portion of the territory within the boundaries of a State, in places other than those "*ceded*" are cognizable in the State tribunals. The cases in Mason and Johnson, involved alone the inquiry, whether the crimes for which the prisoners stood charged were within the State or federal jurisdiction? Whether the places where the offences were committed, were such as the Constitution of the United States gave Congress "exclusive legislation" over? This is not the question in this case. The question here is, has a State court jurisdiction of a suit in which the United States are substantially the parties defendant, though not named as such on the record? If the officers of the United States, having the lawful possession of land severed from the public domain, can be expelled by the judgment of the court, they could be expelled also in cases where the land was not so severed. The analogy drawn from the Mason and Johnson cases proves too much; because, if the application of these cases by the court be correct, they would prove that the federal tribunals had jurisdiction of crimes committed upon the public domain within the limits of a State, which, we believe, has never been pretended. In the Fort Dearborn case, the jurisdiction of the Illinois courts was not sustained because the land in dispute had been severed from the public domain, for, in fact, the land was still a part of the public domain. If that case maintains the jurisdiction of the State judiciary in suits for land, substantially against the United States, it extends that jurisdiction over the whole public domain in like cases.

It is certainly true that no officer can plead the authority of his sovereign in justification of a trespass. In the great McLeod case, the Supreme Court of New York held McLeod responsible, notwithstanding he acted under the authority, or order of his sovereign, and our books are full of cases in which punishments have been inflicted upon officers, acting under orders of the Government, because no authority can justify a tort. In the case of *Osborne* v. *Bank of the United States*, cited by the court, Judge Marshall, expressly says, that "the exemption of the

State from suability, is no objection to the proceedings against its officers, for executing an unconstitutional law." It is readily admitted, that if the defendants in this case, were sued for a trespass, or a tort, or held possession of the land by violence, the "exemption of the" United States "from suability, would be no objection to the proceedings against their officers." But such is not the case. In the case of *Cary et al.* v. *Curtis*, 3 Howard, 236, Daniel, J., in delivering the opinion of the court says: "That the government [of the United States] as a general rule, claims exemption from being sued in its own courts. That although, as being charged with the administration of the law it will resort to these courts as means of securing this great end, it will not permit itself to be impleaded therein, *save in instances forming conceded and express exceptions*." See, also, 7 Mass. 259, and *McCarty* v. *Gould*, 1 B. & Beatty, 389.

Re-hearing refused.

Succession of Ambroise Calleri Dubreuil—Henry R. Lee and others, Appellants.

Prescription running in favor of a debtor is not suspended by his death. C. C. 3487.

The rule *contra non valentem*, &c., does not apply to the creditors, who may interrupt prescription, by presenting their claims to the administrator, and obtaining his acknowledgment thereof, and an order from the Judge classing them among the acknowledged debts of the succession, or, in case of the refusal of the administrator to acknowledge them, by suit. C. P. 984, 985, 986.

The provision of art. 1176 of the Civil Code, which gives an action to the creditors of a succession, who present themselves for the first time after the distribution of the assets among the other creditors, to compel the latter to refund so much as may be necessary to give the rest the proportion they would have been entitled to receive, had they presented themselves at the time of the payment of the debts, can only avail those creditors whose claims have not been prescribed before the expiration of the three years within which such an action may be brought.

Appeal from the Court of Probates of Iberville, *Dutton*, J.

Sigur, for the administratrix. A succession may be released by prescription, like an individual. Troplong, Prescrip. No. 807. Merlin, Repert. *verbo*, Prescription. Ib. Questions de Droit, Succession Vacante, § 2. Civ. Code, art. 3492. *Durnford* v. *Clarke*, 3 La. 201. *Salnare* v. *McDonough's Ex'r.* 6 La. 357. And this, whether solvent or not. 3 La. 201.

Labauve, for the opponents. All the provisions of the Code relative to the administration of estates by curators, syndics, administrators, &c. contemplate necessarily a suspension of prescrip-

2 n. Civ. Code, arts. 1167, 1168, 1169, 1171 to 1176, 1042, 1050, 1057, 1058, 1060, 1061. An administratrix cannot shelter herself from the consequences of her own neglect, under the plea of prescription. 2 La. 183. *Bethany* v. *His Creditors*, 7 Rob.

Morphy, J. Ambroise C. Dubreuil died in the parish of Iberville, on the 15th of October, 1833. His widow was appointed administratrix of his estate, in February, 1834, but rendered an account of her administration only in November, 1844. It was opposed by three creditors, Henry R. Lee & Co., R. P. Gaillard, and R. P. Gaillard & Co., on various grounds, charging the accountant with gross neglect and unfaithfulness in having disposed of, or failed to account for, upwards of ten thousand dollars worth of property belonging to the estate. The notes of the deceased held by Lee & Co., and R. P. Gaillard, became payable a short time before his death, and that due to R. P. Gaillard & Co., fell due in March following (1834). The administratrix pleaded prescription against the claims of those creditors, which had not been placed on the account, or *tableau*, of distribution. By agreement between the parties, the plea of prescription was alone submitted to the Judge below, who sustained it in relation to the claims of Lee & Co., and R. P. Gaillard, and overruled it as to that of R. P. Gaillard & Co. Both the administratrix, and the opposing creditors, whose claims were rejected, appealed.

The question is, whether a succession can be released by prescription from obligations as well as individuals, or in other words, whether the death of a debtor suspends a prescription which was running in his favor? The Civil Code, article 3487, provides that, "prescription runs against all persons, unless they are included in some exception established by law." We find none in favor of the creditors of a succession, and they must be prescribed against, unless they can invoke the general rule, *contra non valentem agere non currit prescriptio.* This rule applies to all cases where the impossibility of acting arises from other causes, than the personal incapacity of the individual against whom prescription is pleaded. 2 Troplong on Prescription, Nos. 700 and 701. 7 Mart. N. S. 481. 1 La. 281. Although, under our laws, no executory judgment can be obtained against a succession, the creditors are not without the means of asserting their claims, and taking the necessary steps to interrupt prescription. All demands

for money, may be presented to the curator, or administrator, to be acknowledged by him. If the debt is admitted to be a just one, he shall write on the evidence of it, a declaration which he shall sign, stating that he has no objection to the payment of such claim, after which the debtor shall submit it to the Judge, that it may be ranked among the acknowledged debts of the succession. Code of Pract. arts. 984, 985. From the time that this is done, which is equivalent to a judicial demand, prescription we apprehend, must remain suspended, as the debtor can do nothing more against the estate, except it be to coerce the administrator to a prompt settlement of the estate. If a claim be unliquidated, or objected to by the administrator, the creditor may bring an action in the Court of Probates, where the succession is opened, and there obtain a judgment against it. Art. 986. These proceedings, by which the creditors can interrupt prescription after the death of the debtor, may be resorted to whether the succession be solvent or insolvent. If a creditor takes no step whatever, but remains silent, as in the present case, a sufficient time for his claim to be barred by prescription, why should he have the protection of the rule *contra non valentem, &c.*, when prescription is opposed by any of the other creditors, or by their legal representatives? The Civil Code, art. 3492, provides that "prescription does not run against a beneficiary heir, with respect to the debt due to him by the estate;" thus placing the beneficiary heirs who administer it, upon a different footing from the other creditors against whom prescription is not suspended. The same article provides, that prescription runs against a vacant estate, though no curator has been appointed to the same. The reason of this provision is, that the creditors of a vacant estate, who have an interest in the preservation of its claims and rights, can provoke the appointment of a curator to assert and enforce them. The well settled doctrine in France is, that prescription runs in favor of, as well as against successions. 2 Troplong on Prescrip. Nos. 884 to 808. Merlin, Repert. vol. 17, p. 431. In *Durnford* v. *Clarke's Estate*, 3 La. p. 201, the plea of prescription was interposed by two creditors of Clarke's estate, against the claim of another creditor which had become extinguished by prescription, only some time after the death of Clarke. It was not pretended in that case, that prescription had been suspended; but it was decided, that one of the op-

posing creditors, who had an ordinary claim, was without interest to make the plea, not having shown that the estate was insolvent; that a mortgage creditor can plead prescription against the claim of another creditor whose mortgage clashes with his own, on the proceeds of the same property; and that, when pleaded by one creditor, prescription does not enure to the benefit of the other creditors. From this decision it is clearly to be inferred, that had the plea been set up by the representative of the estate, it would have been upheld, and that no suspension of prescription results from the mere fact of an estate being under administration. To show that such a suspension is contemplated by the Code, the counsel for the opposing creditors has called our attention to the several articles in it, regulating the manner of settling estates, administered by curators or administrators, and particularly to articles 1197 and 1176. The first provides, that the administration may be prolonged from year to year, during five years; and the second allows three years, after the distribution of the assets, for creditors who have not yet been paid, to claim against those who have been paid the proportion they would have been entitled to, had they come forward at the time of the payment of the debts of the succession. It does not appear to us, that the articles relied on authorize the inference drawn from them, nor that the action given by article 1176, can avail any creditors except those whose claims have not been barred by prescription, before the expiration of the three years allowed by that article. Had the intention of the lawgiver been, that prescription should be suspended for claims against an estate under administration, such intention would have been expressed in that part of the Code which treats of the causes which suspend the course of prescription.

As to the note in favor of R. P. Gaillard & Co., the plea of prescription was properly overruled, as the claim was presented to the administrator, and admitted to be ranked among the just and acknowledged debts of the estate;* but the Judge erred in passing on the merits of the claim, as the question of prescription was alone submitted to him.

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* This is a mistake. See opinion on re-hearing, *infra*.

It is, therefore, ordered and adjudged, that the judgment of the Court of Probates be affirmed, so far as it sustains the plea of prescription in relation to the claims of Lee & Co., and R. P. Gaillard, and overruled as to that of R. P. Gaillard & Co.; and that it be reversed in all other respects; and that the case be remanded to be tried on its merits; the costs to be borne by the opposing creditors.

SAME CASE.—ON A RE-HEARING.

The acknowledgment of an administrator of a claim against a succession, unaccompanied by an order of the Judge directing it to be ranked among the acknowledged debts of the succession, merely interrupts prescription, which will commence to run anew from that time; and where sufficient time subsequently elapses before any further action on the part of the creditor, the claim will be prescribed.

Bonford, for the administratrix, for a re-hearing. The acknowledgment of the administratrix amounted but to an interruption of the prescription, which commenced to run anew from that date.

The French law and mode of procedure in cases of insolvency, furnish an analogy of so strong a character to the case before the court, as to be almost decisive of the question. The creditor under the French insolvent system, is not, as with us, *stayed* from proceeding against the property of the insolvent, or his representative, the syndic. Under that system, it is the duty of the creditor, by article 506 of the Code de Comm. to present his claim to the syndics, who sign upon it, in case of approval, "*admis au passif de la faillite de — pour la somme de —;*" and it is then required to be presented to the Judge. These are precisely the formalities required to be gone through with, by art. 985 of our Code of Practice, on the part of the creditor of a succession. What effect a compliance with these forms produces on the prescription running against the action of the creditor, is a matter discussed at length by several of the most distinguished French commentators, and has been the subject of decision by the highest tribunal known to the French law. Troplong, Pre-

scription, No. 719, considers it unquestionable that every step taken by a creditor in the insolvent proceedings, amounts to a simple *interruption* only, and not to a suspension of the prescription. His language is applicable to this case. "*La vérification a lieu : le créancier affirme la sincérité de la créance, et il est admis au passif de la faillite* (*art.* 505, 507, *Code de Com.*) *De la résulte* une reconnaissance *qui est elle même une nouvelle* interruption *de la prescription. Enfin après que le créancier a conquis cette position, les occasions se pressent encore et se multiplient* ——. *Si* les syndics sont oisifs ou négligents *il peut être utile de provoquer des réunions de créanciers pour les remplacer : si les* opérations de la faillite languissent, *il faut les activer et presser les répartitions. Loin donc* que la faillite comporte un état d'inaction forcée, *elle oblige au contraire le créancier* a faire les diligences les plus actives. Aussi n 'y a-t-il de suspension à aucune de ses phases, *et il a été jugé avec grande raison par la cour de cassation que la prescription* interrompue *par les actes dont nous venons de parler recommence à compter des dernières diligences, et reprend son cours régulier.*" A decision of the Court of Cassation in accordance with these views will be found in Sirey, Vol. 32, 1, 537. And see Dalloz, Prescription, p. 273. Taking in view the articles in the Code of Practice, in the chapter on the settlement of successions, commencing with art. 983, but particularly arts. 985, 988, 990, 991 and 993, it will be perceived that the position of the creditors of a succession with us, strikingly resembles that of the creditors of an insolvent in France. And the remark of Troplong applies with as much force to the former as to the latter, that so far from their position implying inactivity, it, on the contrary, calls for the exercise of the greatest diligence.

In the opinion of the court, it is stated that the claim of R. P. Gaillard & Co., was presented to the Judge, and ordered to be ranked among the acknowledged debts of the succession. This is a mistake. It was never presented to the Judge.

Sigur, on the same side.

Labauve, contra. Art. 986, of the Code of Practice, provides that, "If the claim be not liquidated, or if the curator or administrator have any objection to it, and consequently refuses to approve it,

the bearer may bring his action against the curator or administrator, in the ordinary manner, before the Court of Probates where the succession was opened, and may obtain judgment in the same manner as in other courts." The claim of R. P. Gaillard & Co., was liquidated, and admitted by the executor. They had, consequently, no right to sue thereon; and the principle, *contra non valentem*, &c., applies to them. Were the Judge even to refuse to approve the claim, and to order it to be ranked among the acknowledged claims against the succession, the creditors could not sue the executor.

Simon, J. A re-hearing was granted in this case, in relation only to the overruling of the plea of prescription set up by the administratrix against the claim of R. P. Gaillard & Co., founded upon a note of hand executed by the deceased, made payable on the first day of March, 1834, (the defendant was appointed administratrix in February preceding,) and at the foot of which, the administratrix, on the 13th of June, 1834, wrote the following declaration: "*Je n'ai aucune objection à ce que ce billet soit payé par la succession concurremment avec les autres créanciers de ladite succession.*" Hence, it has been contended, on the part of the opposing creditors, that their claim could not be prescribed, as it was acknowledged by the administratrix, who was bound to place it upon the *tableau;* and that, having done all that the law required them to do, the prescription was suspended, or interrupted as long as the estate was not finally settled. On the other hand, it has been insisted that the acknowledgment of the administratrix, amounted at most to an interruption of the prescription then running against it, and that the only effect of such acknowledgment, was to cause the prescription to begin anew from the date of the written declaration of the administratrix.

We are free to confess, that the question here presented is not a very clear one. The opponents suffered their claim to lay dormant for a period of more than ten years, after procuring the acknowledgment of the administratrix. It is not shown that they ever called upon her to file a *tableau*, and it is only when she filed the account of her administration, and sought to obtain her discharge, that they awoke from their slumber, and attempted to make opposition to her demand.

As we have already said, prescription runs in favor of a succession against its creditors, and may be opposed to their claims, whenever they have failed to make themselves known; to assert their claims against the executor, curator or administrator, in the manner pointed out by law; and have taken no step to interrupt it. Those steps consist *in presenting the claim to be acknowledged by such administrator or curator*, if it be liquidated, who is to write on the evidence thereof, a declaration that he has no objection to its payment, (this has been done in this case,) *and in submitting the same to the Judge, that he may order it to be ranked among the acknowledged debts of the succession.* "*Le porteur de la créance la fera viser par le Juge,*" (this has not been done here,) Code of Pract. art. 985; and if the claim be not liquidated, or the executor or curator objects to it, *in bringing an action against the latter*, in the ordinary manner, and *obtaining judgment upon it;* (Code of Pract. art. 986;)—in both cases, the creditor, who has obtained a judgment, or the acknowledgment of his debt, (*le* visa *de sa créance,*) can only obtain the payment thereof, concurrently with the other creditors. Code of Pract. art. 987. He must wait until a *tableau* of distribution is presented. Code of Pract. art. 988. But he may demand that the property of the succession be sold for cash. Code of Pract. art. 990. The administrator cannot be compelled to pay the ordinary debts until the expiration of three months. Code of Pract. art. 1054. Civ. Code, art. 1167. When the time for payment of the debts has expired, he must present his account or *tableau*, in which he ought to put down the creditors who have made themselves known. Civ. Code, art. 1168. But ten days after the classification and order of payment fixed by the Probate Court, and as often as required by a majority of the creditors, it is his duty to account and pay over to each of the creditors, his proportion of the sums which he may have in his hands, and in default thereof, after due notification, execution may issue against him personally. Code of Pract. art. 993. If the administrator has no funds in his hands, he must then inform the Sheriff of the fact; (Code of Pract. art. 1055;) but the creditor may compel him to prove the truth of his declaration; (Code of Pract. art. 1056;) and if said administrator fails or neglects to pay the

amount due, or to prove that he has no funds in his hands, then his property shall become liable to satisfy the execution that may issue against him. Code of Pract. art. 1057.

Now, is it not clear, that, although a creditor can only obtain the payment of his claim concurrently with the other creditors, yet he cannot be considered as one of those persons to whom the legal maxim, "*contra non valentem agere non currit prescriptio,*" is applicable? He must wait for three months, and cannot issue his execution, if he has obtained a judgment; but does not the law authorize him to act, if the administrator fails to comply with its requisites? See B. & C.'s Digest, 2. 3. Case of the *Succession of Williams*, yet unreported. His hands are not tied; his remedy is explicitly pointed out; and, if he remains inactive and does not present his claim, or, if after having presented it and obtained the acknowledgment of his claim by the administrator, he does not pursue the course pointed out by the law, and permits the prescription to run out from the time of such acknowledgment, can he be allowed to hold the succession, or the administrator, liable forever? We think not; the acknowledgment of the administrator amounts, undoubtedly, to an interruption, but like all other interruptions, it does not prevent the prescription from beginning anew, and from continuing to run until the expiration of the time necessary to prescribe. A similar doctrine is entertained by Troplong, Prescription, No. 719, in which he says: "*Si les opérations de la faillite languissent, il faut les activer et presser les répartitions. Loin donc que la faillite comporte un état d'inaction forcée, elle oblige au contraire le créancier à faire les diligences les plus actives. Aussi n'y a-t-il de suspension à aucune de ses phases, et il a été jugé avec grande raison par la cour de cassation que la prescription interrompue par les actes dont nous venons de parler recommence à compter des dernières diligences et reprend son cours régulier.*" See also Sirey, 1832, part 1, 537. Ib. 1836, part 1, 841.

We conclude, therefore, that, in our opinion, the Judge, *a quo*, has erred in overruling the plea of prescription set up by the administratrix, against the claim of R. P. Gaillard & Co., and that said plea ought to have been sustained.

It is, therefore, ordered, that with regard to the claim of R. P. Gaillard & Co., our former judgment be changed and amended; that the judgment appealed from be, in this respect, avoided and reversed; and that the plea of prescription set up by the administratrix be sustained, with costs in both courts. And it is further ordered that, as the said plea of prescription is sustained with regard to all the opposing creditors, there be a final judgment in favor of the administratrix, against them, without remanding the case as previously ordered.

JAMES W. PROFFIT *v.* JAMES S. KENNEDY.

APPEAL from the District Court of Lafourche Interior, *Deblieux*, J.

C. A. Johnson, for the plaintiff.

Thibodeaux and *Cole*, for the appellant.

MORPHY, J. This action is brought on a note of three hundred dollars, and on an open account for ninety-nine dollars and fourteen cents. The defendant sets up in reconvention, a number of small debts, alleged to have been paid by him, for the plaintiff's account. It appears, that these parties had kept in partnership, for some time, a tavern and billiard room in Thibodeauxville. On the 14th of June, 1842, the plaintiff sold out his interest to the defendant, who gave in payment the note sued on, and assumed to pay all the debts of the concern, contracted since the 7th of January preceding. The greatest portion of the reconventional demand was shown on the trial, to consist of sums either paid with partnership funds, before the dissolution of the partnership, or which the defendant had undertaken to pay. After hearing the evidence adduced by both parties, the Judge below allowed the plaintiff $251 75. The defendant has appealed; but has made no attempt in this court, to show any error in the judgment of the first instance, nor have we been able to detect any, after a close examination of the record.

Judgment affirmed.

Sosthéne Roman *v.* Eugene Ory, Sheriff of the Parish of St. James.

A tax collector cannot be required to receive in payment of taxes, *coupons*, or warrants for the semi-annual interest due on certain bonds of the State, executed in favor of a bank, though the State be bound to pay the interest on the bonds, where the party taxed does not show himself to be the owner of the bonds, and the *coupons* or warrants purport to have been issued, and to be payable by the bank, and the laws authorizing the issuing of the bonds in favor of the bank, give it no power to issue such *coupons* or warrants in the name of the State.

Appeal from the District Court of St. James, *Deblieux*, J.

E. S. Roman and *J. Seghers*, for the appellant.

Beatty, for the defendant.

Martin, J. The plaintiff is appellant from a judgment, which rejects his claim to an injunction to prevent the Sheriff from selling any part of his property for a State tax, on the ground that he is in possession of, and has tendered to the Sheriff, a number of dividend warrants cut out from the margin of State bonds, executed in favor of the Consolidated Association and Citizens' Bank, sufficient to cover the amount of the tax; and farther disallowing his claim for damages, for the illegal seizure.

The First Judge was of opinion, that the bonds of the State bind it to the payment of principal and interest; but that nothing in the laws authorizing the issue of those bonds, gives power to either of the banks aforementioned, to emit dividend warrants in the name of the State; that the plaintiff does not show himself to be the holder of any of the bonds, from which the dividend warrants were cut out, and which are the only legal evidence which the Sheriff, or the court can recognize, of a right against the State.

It does not appear to us, that the court erred. The dividend warrants have no other sanction than the initials of the cashiers of the banks, and purport only the obligation of these institutions to pay them. The Sheriff, therefore, correctly refused to accept these warrants in discharge of the tax.

Judgment affirmed.

Ferdinand M. Young *v.* Lavinia Talbot and Husband.

Action by the holder against the maker of a note, endorsed by the payee in blank, and on which the latter had written an acknowledgment of the receipt of its value from the plaintiff, and at the same time warranted its payment to the plaintiff, or his assigns: *Held*, that judgment by default could not be confirmed against the defendants, without proof of the endorsement of the payee, and of his signature to the transfer written on the note. Proof of a plaintiff's demand is required in all cases when not admitted by the defendants. C. P 312, 360.

Appeal from the District Court of Iberville, *Deblieux*, J.

Simon, J. The defendants are appellants from a judgment by default, regularly taken against them by the plaintiff, and made final after the lapse of three judicial days, the Judge, *a quo*, declaring in his judgment, that he was satisfied by the evidence adduced by the plaintiff in support of his demand.

This suit was instituted on a promissory note bearing date the 21st of May, 1840, subscribed by the principal defendant, and made payable on the 7th of March, 1845, to the order of Henry D. Dawson; by whom it appears to have been endorsed in blank, and by whom *it was* further *acknowledged*, after the endorsement, *that he had received value for said note from the plaintiff, warranting the payment thereof, to the latter or his assigns.* The transfer is dated the 17th January, 1844; and the note sued on is identified with an act of sale from the drawee to the drawer thereof, of certain property situated in the parish of East Baton Rouge, executed by notarial act on the day the note is dated, and stipulating that a special mortgage is reserved on the property sold, to secure the payment of the price.

The appellants' counsel has contended, that the judgment appealed from is erroneous, and that one of nonsuit should have been rendered in the lower court, the plaintiff and appellee having failed to make out his case by proof of the transfer, and assignment by Dawson of the note sued on, to said plaintiff.

The clerk declares in his certificate, that the record contains a true and correct copy of *all the documents on file, proceedings had, and of all the testimony adduced in the cause;* but on referring to the evidence therein transcribed, it appears that the note sued on, the protest made thereon at maturity, and a copy

of the deed of sale, were the only proof adduced by the plaintiff in support of his demand, and that no evidence or testimony was produced, to establish the allegations of transfer from Dawson to the plaintiff contained in the latter's petition, or to show that the endorsement of the original payee, and his signature at the foot of the assignment on the back of the note, were genuine.

The right of the plaintiff to recover on the note sued on, depending mainly upon the transfer or assignment thereof made to him by the original payee, proof of the genuineness of the endorsement and of the execution of the transfer written below it, was a pre-requisite which could not be dispensed with, unless the fact had been admitted by the defendants. Here, no answer had been filed by the appellants, a judgment by default had been entered against them, and the law requires, that no definitive judgment shall be given until the plaintiff proves his demand; this proof being required in all cases. Code of Pract. arts. 312, 360. 16 La. 314. 1 Rob. 16.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, and that this case be remanded for further proceedings on the judgment taken by default; the plaintiff and appellee paying the costs of this appeal.

Adams, for the plaintiff.

A. Talbot, for the appellants.

MARIUS CHAPELLE *v.* JEAN LEMANE.

Where the value of property seized under a *fi. fa.* from a Parish Court, exceeds the sum to which the jurisdiction of the court is limited, an injunction may be obtained, by one claiming to be the owner of the property, from a District Court. The circumstances of the case make it a necessary exception to the provisions of arts. 397, 617, 629 of the Code of Practice.

APPEAL from the District Court of St. James, *Nicholls*, J.

MARTIN, J. The plaintiff is appellant from a judgment sustaining an exception of the defendant, who had obtained a judgment in the Parish Court against a third party. The plaintiff,

alleging that the execution issued thereon had been levied on some property of his, obtained an injunction from the District Court, to the jurisdiction of which the defendant excepted, on the ground, that the Code of Practice requires that in a case like this, relief should be sought before the court from which the execution issued. Art. 397.

The counsel for the appellant contends, that the present case comes within an exception which this court has recognized in the cases of *Hagan* v. *Hart*, 6 Rob. 427, and *McDonogh* v. *Doyle*, 9 Rob. 302. The value of the plaintiff's interest in the property seized, exceeds the sum of $300, and the Parish Court was incompetent to take cognizance of a case in which the value of the object in dispute exceeds its jurisdiction.

In those two cases, we added a new exception to that we had established in the case of *Lawes et al.* v. *Chinn*, 4 Mart. N. S. 390, for the relief of parties whose property was seized out of the parish in which the judgment was rendered. We see no grounds on which we may be dissatisfied with any of these decisions, and conclude that, in our opinion, the exception was incorrectly sustained.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, the exception overruled, and the case remanded for further proceedings; the appellee paying the costs of the appeal.

Roman and *J. Seghers*, for the appellent.

Birault, for the defendant.

PIERRE ESCURIEUX *v.* EDMOND CHAPDU and others, Heirs of Alexandre Chapdu, deceased.

To enable a party to recover the amount of a promissory note alleged to have been deposited with defendant as collateral security, the proceeds of which, exceeding five hundred dollars, were received by the defendant, with whom it is alleged that the note was deposited as collateral security, the deposit must be proved by the testimony of at least one witness, supported by corroborating circumstances.

Escurieux v. Chapdu and others.

In an action to recover the proceeds of a note deposited as collateral security, plaintiff will be entitled to interest on the amount of the note from maturity, where the note was protested at maturity, and defendant acknowledged the receipt of the amount due on it.

APPEAL from the District Court of St. James, *Nicholls*, J.

C. A. Johnson, for the plaintiff.

Ilsley, for the appellants.

MARTIN, J. The plaintiff claims the amount of a note alleged to have been deposited with A. Cerisay, formerly Sheriff of St. James, as collateral security for the production of certain slaves seized, which were timely produced. It is urged, that after Cerisay's death, Chapdu took possession of the said note, as universal legatee of the deceased. The claim is against Chapdu's heirs, who pleaded the general issue. Judgment was given against them, and they have appealed.

The appellants complain, that there is no sufficient proof of the deposit, there being only one witness, and the amount of the note being more than $500, and that interest was improperly allowed anterior to the date when the defendants were put *in mora*, by the inception of the suit.

The deposit was proven by the testimony of Winchester. The appellee contends, that this testimony is corroborated by that of Thibodeaux. This last witness proves, indeed, that the note was found amongst the papers of Cerisay; and this also appears from the inventory of the latter's estate. But Thibodeaux says nothing as to the manner in which the note came into the possession of Cerisay. It is true, he says, that Chapdu told him that Dauphin had said, that the note was the property of the plaintiff, and that, if the latter proved that this was the case, he would readily pay him the amount of the note, or, as he was then on his death-bed, his heirs must do so, as he wished to die an honest man. Lastly, a corroborating circumstance relied upon is, the inability of the defendants to show, that Cerisay obtained the note in any other manner than that which appears in the testimony of Winchester.

The First Judge was of opinion, that sufficient circumstances corroborated the deposition of Winchester. There is an admission in the record, that the slaves seized were returned by the

present plaintiff, then defendent in execution, to the Sheriff, on the day of sale. This admission and the testimony of Winchester and Thibodeaux show, that the plaintiff's slaves were seized by Cerisay and left in his possession, and the note intended to be received as collateral security for their return in due time; and that they were so returned. The inventory shows the receipt of the note by Cerisay. The defendant's ancestor stated his impression that the note might be the plaintiff's property, and added, that he had been told by Dauphin that this was the case. Cerisay does not appear to have exercised any other act of ownership over the note than the possession of it.

We are unable to say that the First Judge erred in concluding that the plaintiff had sufficiently proved his case.

The appellant complains, that interest was allowed from the maturity of the note. This is certainly correct, since it was protested at that time, and the defendant's ancestor had judgment for the principal and interest, and has acknowledged satisfaction.

Judgment affirmed.

ALFRED HENNEN *v.* ONIL BOURGEAT and others.

One sued as the maker of a note is entitled to a trial by jury, only where he has made the affidavit required by sect. 33, of the act of 20 March, 1839.

Defendants having retained plaintiff as their counsel, to defend them in certain actions, in which they had been cited as warrantors, executed a note in his favor for a sum stipulated as his fee. To an action on the note, defendants pleaded that plaintiff never rendered the services, for the compensation of which the note was given. There was no evidence of any services rendered; but it was proved that the parties, who had cited the defendants as warrantors, had effected a compromise, by which the latter were discharged: *Held*, that plaintiff was entitled to recover, and that his inaction might have been the result of a conviction, that it would lead to a compromise, more advantageous to his clients, than any judgment he could hope to obtain.

The fact, that some of the makers of a promissory note, who bound themselves jointly and severally, were unauthorized to contract, does not discharge the rest. *Per Curiam:* A co-debtor, *in solido*, cannot plead any exception merely personal to the other co-debtors. C. C. 2094.

APPEAL from the District Court of Pointe Coupée, *Deblieux*, J.

S. L. Johnson, for the plaintiff, cited B. & C.'s Digest, p. 157, § 33. 16 La. 257.

Cooley, for the appellants.

MARTIN, J. This suit is brought on a note, on which seven parties bound themselves jointly and severally to the plaintiff, in the sum of seven hundred dollars, bearing interest from the date, at ten per cent, the consideration of which was the professional services of the plaintiff in two suits, in which the subscribers were brought in as warrantors. One of the subscribers is not a party to the suit, probably on account of his being domiciliated in another parish than that in which the suit was brought. Three of the others are married women, who do not appear to have been authorized to subscribe the note. They pleaded their legal incapacity, and the First Judge sustained their plea. The answer denies, that the plaintiff rendered those services for the remuneration of which the note was given, and alleges, that the three remaining subscribers are not bound by their signature to the note, because three of the obligors, not having been authorized to sign it, their signature is of no avail, and consequently, the note is the evidence of an inchoate contract, which never received its perfection by the assent of all the parties between whom it originated. The plaintiff had judgment against these three obligors, and the latter appealed.

Our attention was first drawn to a bill of exceptions to the opinion of the court, overruling the claim of the defendants to a trial by jury. It does not appear to us, that the Judge erred, the claim not being supported by the defendants' affidavit required by the Legislature, when the suit is on a note of hand. B. & C.'s Digest, p. 157, § 33.

The record contains no evidence of any action of the plaintiff; but it appears, that the parties who had brought in the defendants as warrantors, effected a compromise, whereby the claims against them were abandoned, and the persons they had called in warranty were discharged.

But it is shown, that the plaintiff was always ready to assist and co-operate with the counsel of those who had called his clients in warranty, until the compromise was effected.

The First Judge correctly concluded, that the apparent inac-

tivity of the plaintiff may have been attended with close and deep study of his case; and have been the result of his opinion, that it would lead to a compromise more advantageous than, and certainly equally so, as any judgment he could obtain. It is clear, that if he had run the risk of a trial and failed, he would have been entitled to the stipulated reward; and we agree with the First Judge, that he equally earned it by temporizing, and holding himself ready to improve any favorable chance that might present itself.

On the other point, the First Judge was of opinion, that the appellants knew, or were bound to know, that some of their co-obligors were not authorized to contract, and must abide the consequences. He is supported by the Civil Code, which provides that, a co-debtor, *in solido*, being sued by the creditor, may plead all the exceptions resulting from the nature of the obligation, and all such as are personal to himself, as well as such as are common to all the creditors; but that he cannot plead such exceptions as are merely personal to some of the other co-debtors. Art. 2094.

Judgment affirmed.

PIERRE CÉSAIRE RICHARD and Maria Eliza, his Wife, *v.* PIERRE BLANCHARD, Tutor of said Maria Eliza Richard.

A tutor being bound to procure medical assistance, when necessary, for the minor, the receipt of a physician for the amount of his fees for such services paid by the tutor, and admitted without opposition, is a sufficient voucher to entitle the latter to credit for the amount. *Per Curiam:* A tutor is not bound to procure evidence of the necessity for such services, where the amount paid is not large, and nothing authorizes the presumption that the payment was improperly made.

A husband has authority to receive whatever may be due to his wife on account of her paraphernal property, when such property is not proved to be under her sole and separate administration; and a payment to him will discharge the debtor. C. C. 2362.

APPEAL from the Court of Probates of West Baton Rouge, *Favrot*, J.

MARTIN, J. The defendant, sued as the tutor of one of the

plaintiffs, Maria Eliza Richard, complains of a judgment which rejects three items of his account. The first is one of $153 56, grounded on a receipt of the Parish Judge, for costs in the settlement of the succession of Elizabeth Mouton. The second of $48, for a doctor's bill; and the last of $1070 26, being the amount of a draft of the defendant on L. Favrot.

It appears to us, that the first item was properly rejected, as there is, on the face of the paper which is the evidence of it, an admission that it was improperly filed. The Judge has rejected the two other items, on the ground, that "the defendant has failed to establish the same by legal vouchers, as prescribed by law." The document for the smaller sum having been admitted without opposition, it appears to us the item ought to have been allowed, as the tutor is bound to procure medical attendance for his ward when necessary, and he is not bound to procure evidence of the necessity, where the claim is not large, and nothing authorizes the presumption of the allowance of an improper claim.

The last item of $1070 26, grounded on the receipt of the husband for a draft on Favrot, is expressed to have been given in relation to the sums in the hands of the drawee, the Parish Judge, belonging to the estate of Etienne Richard, the wife's ancestor. The receipt does not state any particular sum, and is without a date. It does not appear to us that the Judge erred; but as it is evident, that the husband, who had authority to receive whatever was due to his wife on account of her paraphernal property not shown to be under her sole and separate administration, (Civ. Code, art. 2362,) has received from the defendant a draft in relation to the estate of his wife's ancestor, and may be presumed to have collected its amount, since he has not returned it, the plaintiffs cannot avail themselves of the absence of evidence of the amount of the draft. The case must be remanded in order that the deficiency in that part of the evidence may be supplied.

It is, therefore, ordered and decreed, that the judgment be reversed, and the case remanded to be proceeded on according to law, and the principles herein above established; the costs of this appeal to be paid by the appellees.

G. S. Lacey and *Elam*, for the plaintiffs.

Burk, for the appellant.

MICHEL GRANERI *v.* LAVINIA TALBOT and another.

To disprove answers made under oath by a party to a suit to whom interrogatories have been propounded, the testimony must be positive and certain.

APPEAL by the plaintiff from a judgment of the District Court of Iberville, in favor of the defendants, *Deblieux*, J.

Burk, for the appellant.

A. Talbot and *Labauve*, for the defendants.

MORPHY, J. The petitioner having paid as endorser, a note drawn to his order by Adolphe Legendre, seeks to recover its amount from Lavinia Robertson, formerly the wife of Legendre, but now married to Augustus Talbot, and from her brother James Robertson. He alleges, that as this note had been given in payment of a store account, the divers items of which were articles of female ornament and apparel she had bought for her exclusive use, she and her brother and co-defendant promised and assumed to pay the same for the honor of the family. Interrogatories were propounded to the defendants, in answer to which they both denied ever having promised to pay the note, or any part of the account for which it was given. No attempt was made to contradict Mrs. Talbot's answers, and she is clearly not bound. The debt was contracted by her first husband; and it is not shown that she has done any act to render herself liable for the debts of the community since its dissolution. As relates to her co-defendant, James Robertson, four witnesses were examined to disprove his answers on oath. One of them is not certain whether it was the defendant, or Wm. Robertson, who said he would pay the note. Another witness, Holmes, says, that defendant said he would see the note paid to the plaintiff, and also that he would attend to its payment. Monget says defendant did promise to pay the amount of the note to the plaintiff; and according to Bonnecaze, the last witness, the defendant said the note would be paid by the family, and not to be uneasy about the payment of it. These various statements, although vague as to time and place, might perhaps have sufficed to show a promise to pay on the part of the defendant; but they disagree with a declaration made by the plaintiff himself, and which is testified to by two witnesses

whose testimony and character are unimpeached. On being requested by James Robertson, a few days before the trial of the case below, to state what he had said in relation to the payment of this note, the plaintiff answered, that he (the defendant) had said, that if his sister owed the money he would see about it, and that he wanted no man to pay his sister's debts; that if Legendre owed he wanted him to pay, adding that James Robertson had promised to use his influence with his sister to pay, &c. We think with the District Judge, that the precise import of the defendant's promise concerning the note coming from the plaintiff himself, who had the most interest in understanding it correctly, must have more weight than the testimony of witnesses, whose absence of interest in the matter may have rendered them inattentive listeners.

Testimony offered to disprove the answers on oath, of a party interrogated upon facts and articles, should be positive and free from uncertainty.

Judgment affirmed.

THOMAS WELSH *v.* THOMAS RODNEY SHIELDS and another.

Where the proprietor of a plantation on which an overseer is employed by the year, sells the plantation, and the overseer remains in the employment of the purchaser for the rest of the year, receiving his wages for that period from the latter, and continues with the purchaser for the succeeding year, he has no right or privilege on the crop of the second year, made by the purchaser after the sale, for wages due to him by the former proprietor for the preceding year. C. C. 3184, § 1.

APPEAL from the District Court of Terrebonne, *Deblieux*, J.

Beatty, for the appellant.

Stevens, contra.

SIMON, J. This case, is in some respect the sequel of that of *Welsh* v. *Shields et al.*, 6 Rob. 484, in which the plaintiff, having sued for the recovery of his wages as overseer on Shields' plantation, in the year 1841, was allowed, under the article 3184, § 1, of the Civil Code, to exercise and enforce his lien or privilege on his employer's crop of 1842, then in the possession of his co-

defendant Barrow, by whom the plantation had been purchased. The plaintiff's claim, was then limited to the amount due him for 1841, although, in consequence of the sale of the place by Shields to Barrow, he had ceased to act as Shields' overseer, and had acted as such for the latter for a part of 1842. He had finished the crop of 1842 for Barrow's account after the sale, continued to act for the latter as his overseer for the year 1843, but had set up no claim by privilege on the crop of 1842, then sequestered, for the proportion of his wages for the last year, due him by Shields before his sale of the place to Barrow. We then said: "The article, (above quoted,) supposes that there may be cases in which an overseer, who has made a crop on a plantation, may continue to be employed on the same plantation for a part of the following year. In such cases, *where his salary has not been paid for the preceding year, and any part of his wages for the current year be due, the law allows him a privilege on the proceeds of the last crop, and on the crop which is in the ground at the time that his services are interrupted or ended;*" and we came to the conclusion, that the plaintiff had not lost his privilege by the transfer of the place to another person; and that Barrow had purchased the crop, subject to the right previously acquired by the plaintiff. Thus, we recognized that the crop of 1842, then sequestered in Barrow's hands, was affected to the payment, by privilege, of the amount due to the plaintiff for his wages for the year 1841, *which he claimed*, and also for so much as was due him for the year 1842, *which he did not then claim*, and ordered that his demand should be satisfied out of the proceeds of said crop accordingly. Our judgment was based upon the article above quoted, which provides, that "the debts which are privileged on certain moveables are: First, *the appointments or salaries of the overseer for the year last past*, (1841,) *and so much as is due of the current year*,(1842,) *on the proceeds of the last crop*, (that of 1841,) *and the crop at present in the ground*," (that of 1842 sold to Barrow in the fall of that year.) The writ of sequestration issued to enforce the plaintiff's privilege, had been executed during the rolling season of 1842, and we thought that the law relied on was then clearly applicable.

But the plaintiff now seeks to recover of Shields the amount

due to him, for his services as overseer on the plantation, from the 1st of January, 1842, to the 9th of November following, to wit, $771 70, at the rate of $900 a year, the difference for the balance of the year, to wit, $128 30, having been paid to him by Barrow; and he has made the latter a party to the suit, in order that a privilege might be decreed to him, the plaintiff, on the crop of 1843, made since Barrow became the owner of the plantation, he, being in the employ of Barrow when said crop was made, but being in the employ of Shields when the amount claimed accrued.

In order to secure the exercise of the privilege claimed by the plaintiff on Barrow's crop raised in 1843, the plaintiff obtained a writ of sequestration, for such part of said crop as might be sufficient to satisfy his claim; and, accordingly, seventeen hogsheads of sugar were seized and sequestered by the Sheriff.

Judgment was rendered below, against Shields, for the amount sued for; but the Judge, *a quo*, having refused to allow the plaintiff the privilege by him claimed on Barrow's crop of 1843, rejected his demand as against Barrow; and from this last judgment the plaintiff has appealed.

It is first to be noticed, that the petition in this suit contains no allegation, that Barrow is personally bound for the debt sued for; and it alleges, that the plaintiff's object, in calling Barrow as a party defendant in this suit, is only to exercise his alleged privilege on the crop of 1843, contradictorily with the owner thereof.

The only evidence upon which the question of privilege was tried below, results from certain admissions of the parties found in the record, in the following words: "It is admitted, that the plaintiff acted as overseer of the Myrtle Grove plantation, in the employ of T. R. Shields, as alleged in the petition, in 1842; that his compensation for the same is correctly stated therein; that said plantation was sold, and the slaves thereon to R. R. Barrow, on the 9th of November, 1842, and possession thereof taken by said Barrow, and ever since continued. That, during the year 1843, Welsh acted as the overseer on said plantation by contract with Barrow, and that the value of the crop made thereon in 1843, was more than one thousand dollars, besides expenses."

We think the Judge, *a quo*, did not err. From our decision in

the first case, it is clear that the plaintiff was entitled to his privilege on the crop of 1842, raised by him for the benefit of Shields, and sold by the latter to Barrow before said crop was finished; his right was acquired at the time of the sale, and the subsequent act of his employer could in no manner infringe or defeat it; but this is no reason why he should pretend to enforce his said privilege upon the proceeds of the crop of the ensuing year made entirely after the sale to, and possession of, Barrow, and why the latter should be made responsible to pay Shields' debt, and be obliged to suffer a privilege to be exercised on his own crop for services rendered to Shields for a part of the previous year. In the case of *Johnson* v. *Kennedy et al.*, 3 Rob. 216, we held that art. 3148, supposes a continuity of services. Here, the plaintiff's services for Shields had ceased; and although he continued to act as overseer on the same place for Barrow, the continuity of services was not for the same person; and, in such case, we are not ready to say that the overseer's privilege should extend, with regard to the salary due him by the former proprietor for the services of the previous year, to the crop made in the subsequent year by another person. The right, according to the article of the Code, appears to be allowed in relation to the same employer, who has not paid his overseer's wages for the year last past, and who continues to keep him in his employ for the whole or part of the following year; but we cannot admit the proposition, that such overseer has a right to exercise his privilege upon the third crop made on the same plantation by a third person, and that such third person should be made thereby indirectly liable to pay the debts of the former owner. In the first case, the plaintiff's right on the crop of 1842, had been acquired previously to the sale; but in this instance, it is clear, that having never acquired any right on the crop of 1843, as resulting from the services by him rendered to Shields, he has none to exercise.

With regard to the right which the plaintiff may have to claim the amount due to him out of the proceeds of the crop of 1842, which was disposed of by Barrow after his purchase, and which the latter may have kept in his hands, this is a question which is not presented by the pleadings; and if any such right exist, so as to make Barrow personally bound to pay said amount, it has been

properly reserved by the Judge, *a quo*, in the judgment appealed from.

Judgment affirmed.

JOHN NOLAN *v.* PIERRE PAUL BABIN and another.

Where the records of a court of justice show that a judgment was pronounced on a particular day, evidence of witnesses is inadmissible to show that no such judgment was pronounced. *Per Curiam:* Parol evidence is inadmissible to contradict the records of a court of justice.

A District Court cannot enjoin the execution of a judgment rendered by a Probate Court.

APPEAL from the District Court of West Baton Rouge, *Deblieux*, J.

SIMON, J. This suit was commenced by injunction for the purpose of arresting the action of the Sheriff, on a writ of possession which had been issued from the Court of Probates of the parish of West Baton Rouge, in consequence of a judgment said to have been rendered by the said court, homologating a certain act of partition, and overruling the plaintiff's objections thereto. The grounds upon which the injunction was obtained, and which were sworn to by the plaintiff at the foot of his petition, *as being true and correct*, amount to an absolute denial that *any judgment* overruling his opposition to the partition and homologating the same, *had ever been rendered and read in open court by the Judge of Probates;* and are based upon the positive allegations that *there was not, and could not be, any judgment executory homologating said partition, and referred to in the writ of possession, and decreeing the slaves therein named to be the defendant's property, &c.;* and that *he had notified the Sheriff of the non-existence of any such executory judgment, &c.*

The defendant having thought proper to join issue upon the allegations of the petition, and mainly upon the fact of the existence or non-existence of the judgment upon which the writ of possession was issued, subsequently applied to us for a writ of prohibition against the Judge, *a quo*, and to the party who had

obtained the injunction, and for a writ of *mandamus* to be directed to the Sheriff, ordering him to carry the writ of possession into effect, and to put the applicant into possession of the slaves; on the grounds that said Judge had exceeded his jurisdiction in granting the injunction, that such jurisdiction was exclusively vested in the Probate Court, by which the judgment had been rendered and the writ issued, and that, consequently, for all the matters in contest in the original suit, the District Court was divested of its concurrent jurisdiction, &c. We recognized the legal principles upon which the application for a writ of prohibition was founded, but we discharged the rule, as it did not appear that the party had applied in vain, to the inferior tribunal for relief; and as we were of opinion, that under the issues presented in that case, the jurisdiction of the District Court depended upon the existence or non-existence of the judgment alluded to in the applicant's position. See 9 Rob. 480, and 10 Ib. 169, which contain a fall exposition of the pleadings, and of the respective positions of the parties on the subject in controversy.

This case was subsequently tried in the court, *a qua*, where the judgment upon which the writ of possession had been issued was produced, as also the minutes of the court previous to, and after rendering the same; when the District Judge, being of opinion that the injunction had been wrongfully obtained, on the unfounded assumption that there was no judgment, and that the Sheriff and the plaintiff's adversary were trespassers, dissolved the same; and from this judgment, (the question of damages being reserved by the parties for further adjustment,) the plaintiff has appealed.

The record contains satisfactory evidence, that the writ of possession complained of was issued by virtue, and in consequence of a judgment regularly and contradictorily rendered between the parties, by the Probate Court; nay, the minutes of said court show that, on the 21st of September, 1844, the trial of the appellant's opposition to the homologation of the partition was postponed until the 26th; that, on the latter day, after hearing the arguments of the then plaintiff's counsel on the defendant's objections, the latter's opposition was overruled, *in toto;* that, on said day, said defendant offered in evidence, divers documents in sup-

port of his objections; that the partition was homologated; and that, on the same day, the court delivered its judgment, *in extenso*, pointing out and detailing the property decreed to belong to the plaintiff Babin, and ordering that he be put in possession thereof, according to law.

But the record further shows, that on the trial of this cause in the lower court, the plaintiff offered divers witnesses to establish the allegations in his petition, that no judgment as averred by him ever was rendered or read in open court; and also to establish the fact, that the Probate Court had adjourned on the day alleged, without rendering any judgment on which the writ of possession was issued. The testimony was rejected by the court, *a qua*, and the appellant took a bill of exceptions.

We think the Judge, *a quo*, did not err. There is no principle better settled in the law of evidence, than that parol testimony cannot be admitted to contradict the records of a court of justice. Courts of record, says Starkie, part 4, p. 1043, speak by means of their records *only;* and even where the transactions of courts, which are not, technically speaking, of record, are to be proved, if such courts preserve written memorials of their proceedings, those memorials are *the only authentic means of proof* which the law recognizes. This is a safe rule which cannot be violated, and which this court had occasion to sanction in the case of *Williams* v. *Hooper*, 4 Mart. N. S. 176.

It is clear, that the injunction sued out in this case was wrongfully obtained; that the allegations on which it was applied for were unfounded; that, at the time the writ of possession was issued, there was a judgment entered, which, contrary to the sworn allegations of the plaintiff, had been finally and regularly rendered; that the sole object of the plaintiff, in suing out an injunction from the District Court, was perhaps to arrest the regular course of justice, by suspending the action of a public officer, acting under a writ duly issued from a court of competent jurisdiction; that the District Judge, had he been made aware of the existence of the judgment of the Probate Court, would have refused to grant the writ of injunction; that he was induced to grant it, from the positive allegations of the plaintiff, that no judgment whatever existed, or had been rendered; and that the valid-

ity or nullity of a judgment of the Court of Probates, cannot be inquired into in the District Court, or such judgment arrested in its effect, by a writ of injunction issued from another tribunal foreign to its jurisdiction.

The judgment appealed from must, therefore, be affirmed; but as under our laws, the party, at whose request an injunction has been wrongfully sued out, is bound to undergo all the consequences of his illegal act, when injurious to the rights of his adversary, we think justice requires that this case should be remanded to the lower court, for the purpose only of trying and adjusting the question of damages reserved by the parties, as resulting from the injunction bond furnished by the plaintiff and appellant.

It is, therefore, ordered and decreed, that the judgment of the District Court be affirmed with costs; and it is further ordered and decreed, that this case be remanded to the court, *a qua*, for the purpose only of trying the question of damages reserved by the parties.

Lobdell, *Brunot* and *Labauve*, for the appellant.

Robertson, for the defendants.

JOHN DUTTON *v.* GUSTAVE S. ROUSSEAU, Sheriff.

One whose property has been seized and sold, after notice of his title, under an execution against a third person, may recover not only the value of the property, but damages for the illegal seizure and sale.

One who possesses personal property, not as owner, but as agent, can acquire no title by prescription, even as to third persons.

APPEAL from the District Court of Iberville, *Deblieux*, J.

Labauve, for the plaintiff.

Burk, for the appellants.

MORPHY, J. The defendant, Sheriff the parish of Iberville, is sued for damages to the amount of eight hundred dollars, on the allegation that he wrongfully seized and carried away from a public livery stable, kept by one Isaac Ashbrook, in the town of Plaquemines, a stallion called Little Red, the property of the petitioner, and that although he was duly warned and notified that said horse belonged to the petitioner, and was shown his title to

the same, he persisted in his illegal proceeding, and actually sold the said horse, on the 3d of February, 1844. The defendant denied being indebted to the plaintiff, and averred that under a writ of *fieri facias*, in a suit of *John J. Burk* v. *Isaac Ashbrook*, and by the direction of the said John J. Burk, he seized in the possession of Ashbrook the stallion in question; that having been notified that the horse was not the property of the defendant in execution, he advised John J. Burk of the fact, but that the latter insisted on the seizure and sale of the horse as the property of Ashbrook, and gave respondent a bond with Jean Baptiste Rils, as surety, to indemnify him for all damages he might sustain in consequence thereof; and that he thereupon executed the writ by seizing and selling the horse. The Sheriff prays that Burk and Rils be cited in warrranty to defend this suit, and, that he have, against them *in solido*, judgment for such sum as he may be decreed to pay to the plaintiff. The parties cited in warranty answered, by denying the defendant's right to call upon them under their indemnity bond, because he was not authorized by law to require of them such a bond, the property seized being personal property found in the actual possession of Ashbrook, the defendant in the execution, which it was his official duty to levy upon. They deny that they ever had, before the sale, any notice of any outstanding title in any other person than Ashbrook, except from the latter's assertion, which they were justified in disregarding. They deny plaintiff's ownership, and aver, that if he ever had any title to the horse, he had no longer such title at the time of the seizure and sale, having lost the same by prescription, and by suffering the said Ashbrook, for a number of years to remain in possession of the horse, and to act as the ostensible owner of the same, &c. The case was laid before a jury who gave their verdict for $337 33, in favor of the plaintiff against the defendant, and for a like sum in favor of the latter against his warrantors; a motion for a new trial having been overruled, and judgment entered up in conformity with the verdict, the defendant and warrantors appealed.

The evidence conclusively establishes the plaintiff's ownership of the horse, which he bought in 1835, from Wm. H. Bell, for $400. It further shows, that at the time of his purchase, the

horse was at the public livery stable of Ashbrook, and continued to be kept there for plaintiff up to the date of the seizure; that the Sheriff was informed by Ashbrook, that the horse was the property of the plaintiff; but that having received an indemnifying bond from the plaintiff in the execution, who insisted on his levying under his writ, he seized and sold the horse, which was bought by the said plaintiff for $32. The bond recites, that Ashbrook had denied having any claim or property in the horse, and at the Sheriff's sale the plaintiff had his title to the same exhibited and read. There is some diversity of opinion among the witnesses as to the value of the horse at the time of the sale, their estimates ranging from $150 to $400. One of them says, that he came to the sale, intending to bid the latter sum, which he would have given, if he could have had a good title to the horse. We cannot say, under the evidence, that the amount awarded by the jury is excessive as is urged by the appellants. It is given not only for the actual value of the horse, but also for the damages claimed, the assessment of which is the peculiar province of the jury. Some reliance is placed on the circumstance, that Ashbrook several times advertised the horse, and made out bills for its services in his own name, and even mentioned to one of the witnesses that he was the owner of it; but it is shown, that posterior to the time alluded to by this witness, Ashbrook always said that the horse belonged to the plaintiff, and so stated to a number of persons. It is also shown to be customary with the keepers of stallions to advertise them in their own names, whether owned by them or not. The plea of prescription is untenable, as Ashbrook never possessed as owner, but as plaintiff's agent.

Judgment affirmed.

EDWARD G. HYDE and others *v.* CARMELITE ERWIN, Curatrix of Isaac Erwin, an Interdicted Person.

District Courts have jurisdiction of actions against the curator of an interdicted person to recover a claim against the person interdicted.

APPEAL from the District Court of Iberville, *Deblieux*, J.

Labauve, for the plaintiffs.

Talbot and *Robertson*, for the appellant.

MORPHY, J. The defendant is sued as the curatrix of her husband, Isaac Erwin, an interdicted person, on a note for $820 60, drawn in favor of the petitioners by the said I. Erwin, some time before his interdiction. An exception was taken to the jurisdiction of the District Court, which being overruled, the defendant pleaded the general issue; and she now appeals from a judgment rendered against her below.

We are not aware of any provision in the Code of Practice, authorizing Courts of Probates to take cognizance of claims for money, except when due by successions under the management of curators, testamentary executors, administrators, &c. Arts. 924, 983. This court has accordingly held, that the ordinary tribunals have jurisdiction of suits brought against minors, when they are in possession of an estate already administered upon by a curator or testamentary executor, or when the debt is due by themselves. Code of Pract. art. 996. 6 Mart. N. S. 519. 4 La. 202. 5 La. 384. 10 La. 18. 11 La. 359. In the case of *Babin* v. *Todd*, *Tutor*, 4 Rob. 20, we said: "We can see no good reason, nor are we acquainted with any law which should prevent the District Courts from taking cognizance of claims against minors, or against interdicted persons, or absentees, whose estates are administered by curators. If minors be suable as heirs in the ordinary courts, under article 996 of the Code of Practice, for debts due by the successions which they inherit, it would seem, that they cannot except to such jurisdiction when sued for debts due by themselves. In the absence of any expression of legislative will on the subject, we do not feel authorized, either to extend the limited jurisdiction of the Courts of Probates, or to restrict the general one vested in the ordinary tribunals." The plea to the jurisdiction of the court was properly overruled.

Judgment affirmed.

ZENON LABAUVE *v.* CARMELITE ERWIN, Curatrix of Isaac Erwin, an Interdicted Person.

APPEAL from the District Court of Iberville, *Deblieux*, J.

Labauve, pro se.

Talbot and *Robertson*, for the appellant.

MORPHY, J. This case presents the same question of jurisdiction, as that just decided in Hyde & Goodrich, against the same defendant.

Judgment affirmed.

JAMES MORTON *v.* JEREMIAH WEATHERBY.

APPEAL from the District Court of Iberville, *Deblieux*, J.

Talbot, for the plaintiff.

Edwards, for the appellant.

MARTIN, J. The defendant complains of a judgment, by which the claim of the plaintiff, a joint and several co-debtor of his, for the excess of payments, made on account of the common debt, is sustained. The question turns upon mere matters of fact and of calculation. We have carefully examined the amount and dates of the different items in the plaintiff's account, and have gone over the calculations of the First Judge, and have arrived at the result to which he was led.

The plaintiff has claimed damages for the frivolous appeal. As the balance is not large, being only $356, and the judgment allows interest thereon, at the rate of ten per cent, we have not thought proper to allow damages.

Judgment affirmed.

JOHN SEDLY WEBB *v.* JOHN GOODBY and others.

A testator leaving three or more children, or the descendants of three or more children, cannot dispose by donation *mortis causa* of more than one-third of his property. C. C. 1480.

Grandchildren, forced heirs of the testator by representation of their mother, are bound to collate any legacy made to them by the testator, unless expressly made as an advantage over their co-heirs and besides their legitimate portion. C. C. 1306, 1307.

APPEAL from the Court of Probates of Iberville, *Dutton*, J.

Keep, for the appellant.

Hamilton and *Labauve*, for the defendants.

MORPHY, J. This action is brought by one of the heirs of the late James Goodby, to obtain a partition of the succession, the reduction of certain legacies exceeding the disposable portion, and the collation of donations, *inter vivos*, made to his co-heirs by the deceased. At the time of his death, James Goodby left three children, either alive or represented, to wit: John Goodby, Anna Cecilia Goodby, the deceased, wife of Webb, represented by the plaintiff, John S. Webb, her only son, and Mathilda Goodby, the deceased wife of Levi Luckett, represented by three minor children. In his lifetime, the deceased had advanced to John Goodby $1300, as a portion of the share he was to receive from his succession; and, in like manner, he had advanced $950 to his daughter Mathilda Luckett. By his last will and testament, James Goodby bequeathed all his property to the children of John Goodby, and to those of his deceased daughter Mathilda Luckett, declaring that if John S. Webb, the only son of Anna Goodby, ever returned to the country, he gave him one-fifth of his property, &c. By a codicil made shortly after, the testator ordered the emancipation of two of his slaves, who were appraised in the inventory of the estate at $600. Under these facts, which appear of record, the Probate Judge decreed, that the children of John Goodby were entitled, as legatees, to one-third of the estate, after deducting the appraised value of the two slaves emancipated; that John Goodby, and the heirs of Mathilda Luckett should collate, and bring back to the mass of the succession, the sums

respectively received by them; that each of the heirs of the deceased, or their representatives, should receive one-third of the estate after paying the debts, claims, legacies and charges against it; and that a partition should be made accordingly. From this judgment John S. Webb appealed.

The counsel for the appellant has not informed us, nor are we able to discover, what is his ground of complaint against the judgment appealed from. The testator having three children, could dispose of one-third of his estate, to which proportion the Probate Judge has reduced the legacies contained in his will. The whole of the disposable portion, after deducting the value of the slaves emancipated, was properly given to the children of John Goodby, inasmuch as those of Mathilda Luckett, being forced heirs of the testator by representation of their mother, were bound under the law to collate the legacy to them, the testator not having expressed his intention that any part of it should be given to them as an advantage over their co-heirs, and besides their legitimate portion. Civ. Code, arts. 1306, 1307, 1480.

Judgment affirmed.

JOHN CARPENTER *v.* ELLEN ADAIR BEATTY and Husband.

To entitle a plaintiff to recover on a contract executed by a person acting as an agent, the authority of the agent must be proved.

A curator, *ad hoc*, appointed to represent an absent defendant, has no right to appear for the defendant, until regularly cited.

A curator, *ad hoc*, cannot waive the production of any evidence necessary to establish the plaintiff's claim; nor can he consent to any judgment being rendered against the absentee, or waive any legal right of the party he is charged to defend.

The exception of *res judicata* can be pleaded for the first time before the Supreme Court, only where the facts necessary to sustain it appear from the record. C. P. 902.

APPEAL from the District Court of Pointe Coupée, *Deblieux*, J.

SIMON, J. The object of this action is to recover of the defendants, who are absentees, the amount of three promissory notes, which are alleged in the petition to have been given in

consequence of a certain contract made with their agent, for the purpose of making and building a levée on a tract of land belonging to E. A. Beatty, situated in the parish of Pointe Coupée. The notes sued on purport to have been signed by William Beatty, acting as the agent of the defendants, are made payable to the plaintiff, and amount together to the sum of $1291 98, to be paid on the first January, 1843.

On the application of the plaintiff, William Beatty, through whom the contract and notes sued on appear to have been executed in the name, and as the agent of the defendants, was appointed curator, *ad hoc*, to represent and defend them in this action. No citation was served upon him, and he entered his appearance in his capacity of curator, *ad hoc*, by filing his answer and pleading the general issue.

Judgment was rendered below, in favor of the plaintiff, against the defendant E. A. Beatty, for the sum of $1000, upon a verbal agreement of the counsel of both parties in court, that it should be rendered for that amount, and execution stayed upon it until three months from the date thereof; and from this judgment the defendant E. A. Beatty has appealed.

It appears from the statement of facts, that the only evidence introduced by the plaintiff in support of his demand, was a contract, under private signature, between William Beatty as agent, and the plaintiff; a *procés-verbal* or report signed Alex. Ardrey, Syndic of Roads and Levées, for the first section, first district, of the parish of Pointe Coupée; and the three notes sued on, executed by William Beatty, as agent of the defendants. Nothing else was proved, and judgment was rendered against the defendant E. A. Beatty, without its having been shown that William Beatty was ever authorized to act as the agent of the defendants, and to bind them by the contract and notes by him executed in their names. It is true, the judgment appealed from was rendered with the consent of the curator, *ad hoc;* but could the curator give any consent to bind those whom it was his duty to defend?

It is now well settled in our jurisprudence, that until regular process is served upon the curator, *ad hoc*, he has no capacity to act as such; that he cannot waive any of the legal proceedings

required for the protection of the rights of the absentee he is called upon to defend; that his powers must be strictly limited to those conferred by law; that they cannot be extended to the performance of any other acts than such as tend to the defence of the rights and interests of the absentee whom he represents; that he cannot waive, prospectively, on behalf of his client, the production of legal evidence, nor bind him by agreeing to dispense with the forms of the law in taking it; that he cannot surrender any lawful means of defence, to the injury of the absentee whom he represents; that attorneys at law have not the power to acknowledge debts claimed against their clients, and, *a fortiori*, a curator, *ad hoc*, whose authority is not greater than that allowed to the attorneys employed by the party; and that, as a general and fixed rule, a curator, *ad hoc*, cannot be permitted to waive any of the legal rights of the party he is charged to represent and defend. 10 Mart. 474. 3 La. 203. 13 Ib. 284. 17 Ib. 117. *Hill et al.* v. *Barlow et al.* 6 Rob. 142. *Hyde et al.* v. *Craddick*, 10 Ib. 387. And *Kræutler et al.* v. *The Bank of the United States*, *ante*, 456. Here, therefore, it is clear, that the proceedings had in this suit, from the day of the appointment of the curator, *ad hoc*, are irregular and illegal; that said curator, not having been cited, had no right to appear for the absentees; that he could not waive the production of the legal evidence upon which the plaintiff's claim is based; that he could not consent to the rendering of any judgment against said absentees for the amount claimed, nor any part thereof; and that all said proceedings and the judgment appealed from, are mere nullities.

This action, however, appears to have been properly instituted; and the order appointing a curator, *ad hoc*, to the absent defendants was legally rendered. We think, that although the subsequent proceedings were irregular and illegal, this suit ought not to be dismissed; but that justice requires it should be remanded to the lower court, to be re-instated on its docket as a suit newly commenced, to be proceeded in according to law.

With regard to the plea of *res judicata*, filed in this court by the appellee, it cannot be noticed. It is true, it is one of those peremptory exceptions which may be pleaded at any period of a cause; but nothing has been shown to substantiate it, and the proof of

it does not appear by the mere examination of the record. Code of Pract. art. 902.

It is, therefore, ordered and decreed, that the judgment of the District Court, be annulled; and it is further ordered and decreed, that this cause be remanded to the inferior tribunal to be re-instated on its docket as a suit newly commenced, to be proceeded in according to law; the costs in the lower court from the filing of the answer of the curator, *ad hoc*, and those in this court, to be borne by the plaintiff and appellee.

Cooley, for the plaintiff.

Lacoste, for the appellant.

AMARON LEDOUX and others *v.* PIERRE PORCHE.

Where a factor transmits to his principal accounts of the sales of his crops, and of advances of money and purchases made for him, and proves their receipt by the principal, and the latter receives such accounts without objection, and acknowledges the receipt of the articles purchased for him, he will be presumed to have assented to the correctness of the account; and in an action by the factor for a balance due to him, the burden of proving that the crops sold for more, or that the articles furnished had been purchased for less than the account shows, is on the defendant.

APPEAL from the District Court of Pointe Coupeé, *Deblieux*, J.

Provosty, for the plaintiffs.

Lacoste, for the appellant.

SIMON, J. The defendant is appellant from a judgment which condemns him to pay to the plaintiffs the sum of $572 19, which is the balance of an account current heretofore existing between the parties, and to prove which, said plaintiffs thought proper to probe the conscience of their debtor.

It results from the answers of the defendant to the interrogatories propounded to him by the plaintiffs, that the latter were his commission merchants, in the city of New Orleans, between the years 1841 and 1844; that he, the defendant, received all the articles, goods and merchandize specified in the account annexed to the plaintiffs' petition; that he does not recollect having with said plaintiffs, an account current which has never been settled; and that said defendant acknowledges to have received

from the plaintiffs, an account similar to the one sued on, and to have also received every year from his commission merchants, an account current, in which he was debited with the drafts, sums of money or payments, goods and merchandizes, drayages, commissions, &c., and debited with the proceeds of cotton specified in said account.

The account current annexed to the plaintiff's petition, begins with charging the defendant with $36 73, being the balance due according to account rendered, bearing date 30th of June, 1842. The items which follow said balance, consist of divers goods and merchandize forwarded to him at divers periods, renewals and payments of notes in bank, payments of drafts in favor of divers persons; and show the credits to which said defendant is entitled, as proceeding from sales of cotton, &c., from the 20th of July, 1842, to the 16th of August, 1843, periods within which all the different items in the account are embraced, showing on the debit side thereof, an amount of $2118 78, and on the credit side, a sum of $1546 57.

The correspondence of the defendant with the plaintiffs shows also the nature of his dealings and transactions with them. They were his commission merchants, charged with the sales of his cotton crops, and were in the habit of procuring and purchasing for him the articles which he wanted, and of renewing his notes in bank, and paying the drafts which he drew upon them at different periods. All the drafts and notes mentioned in the account current were produced in evidence, and are found in the record.

It is clear, that the defendant, who acknowledges that he has received all the articles of goods and merchandize enumerated in the account current, and that he has been furnished with an account similar to the one sued on, and also that he received every year, an account current of his dealings with the plaintiffs, and who tacitly recognized the correctness of the claim by making no objection thereto, cannot now pretend that said claim is unfounded. The plaintiffs were his commission merchants, acted as his agents, purchased goods for him, and accepted his drafts and paid his notes in bank in that capacity; and it seems to us, that his silence precludes any objection, now, to his reimbursing to the plaintiffs, the amount of their advances. 7 Mart. N. S.

142. 10 La. 298. Merlin, Questions de Droit, *verbo*, Compte Courant, p. 488. Here, however, there is more than the defendant's ratification of the acts of his agents as resulting from his silence. There is positive proof of his having received from them the goods and merchandize carried in the account, of his drafts having been paid as charged, and of his notes having been renewed. His defence is limited to the general issue; and although, in answer to one of the plaintiffs' interrogatories he states evasively, that *he does not recollect having with the plaintiffs an account current that has never been settled*, we are not prepared to say, that his want of recollection can be taken as proof that he owes the plaintiffs nothing, or can, in any manner, weaken the evidence which has been adduced by the latter to establish their claim. The goods were not sold by the plaintiffs, but were purchased by them at the request of the defendant, as advances made to him on the sales of his crops; and we agree with the Judge, *a quo*, in the opinion, that said plaintiffs having established the receipt of the accounts, and of the articles of merchandize purchased for his benefit, it was his duty to prove that his cotton had been sold for more than is accounted for, or that the articles furnished had been purchased for less than charged.

Judgment affirmed.

JOSEPH W. TUCKER, Testamentary Executor of Abner Robinson, deceased, *v.* J. C. BEATTY, Attorney of the absent Heirs of Abner Robinson.

A testator having directed that plaintiff, who was joint owner with him of a plantation, and who subsequently qualified as his testamentary executor, should have the privilege of taking his share of the plantation at a certain price, the latter, as executor, presented a petition to the Probate Court praying that the attorney of the absent heirs might be cited, and the testator's half of the property adjudicated to him at the price fixed by the will. It was proved that the succession was insolvent. *Held:* that the estate being insolvent, a meeting of the creditors should have been called to deliberate on the most advantageous manner of selling its effects (C. C. 1160); that the creditors alone have the right to fix the time and conditions of the sale of the property; and that the proceedings, not having been carried on contradictorily with the creditors, nor with their consent, must be dismissed.

Appeal from the Court of Probates of Lafourche Interior, *McAllister*, J.

C. A. Johnson, for the appellant.

Beatty, attorney for the absent heirs, contra.

Simon, J. The last will and testament of Abner Robinson deceased, by him executed in the State of Virginia, having been proven and admitted to record by proceedings had before the Circuit Superior Court of law and chancery for Henrico county and the city of Richmond, on the 21st of December, 1842, the same was subsequently ordered to be executed in this State, by the Court of Probates of the parish of Lafourche Interior. The deceased had appointed in his said will several executors, among whom was Joseph W. Tucker, who, having alone complied with the requisites of the law, was duly qualified, and proceeded to act as the sole executor in this State.

Inventories of the property left by the deceased in Louisiana, were made at the request of the plaintiff as executor, in February, March and April, 1843, amounting to very large sums, and the estate was accordingly put under the administration of the plaintiff, in execution of the will of the deceased. The will first directs the payment of the testator's debts, and after leaving several legacies to individuals therein named, amounting in the aggregate to one hundred and sixty-five thousand dollars, proceeds to say: "I desire that my Louisiana estate shall be kept together, and not sold until the 1st of January, 1845, and the profits arising therefrom in the mean time applied to the payment of my just debts and legacies, and, as soon after the said first of January, 1845, as practicable, I desire that my home plantation on the Lafourche may be sold for the best price that can be obtained therefor, payable in six equal instalments, &c." The testator further says: "I desire that Joseph W. Tucker shall have the option of taking my moiety of the estate and the property therein owned jointly by us in Louisiana, as it now stands, at seventy-five thousand dollars, payable in three equal annual instalments from the day of sale without interest, and in case any additional property shall be put on the estate before the sale, one-half of the value of such additional property is to be paid for by him on the same terms in addition to the above price. And if the said Tucker

refuses to take my moiety of the estate, on the terms above stated, then I direct my executors to sell the same, and also the rest of my Louisiana property, upon such credit and terms as to them shall seem best calculated to insure a good price."

It further appears, that the estate was very largely involved at the time of the death of the testator, and that the testamentary executor having rendered an account of his administration before the Probate Court, the same was homologated on the first of December, 1845, showing yet an indebtedness by the succession, as admitted by the executor, of upwards of two hundred thousand dollars, exclusive of the legacies. The plaintiff was continued in his functions of executor according to law.

The object of the present proceeding instituted by the testamentary executor, on the 20th of January, 1845, is to carry into effect the provision of the will relative to the adjudication to himself, of the property owned jointly by him and the deceased; and, for that purpose, he has caused the attorney appointed to represent the absent heirs to be cited, in order that the rights accruing to him under the will, may be investigated and adjusted contradictorily with the said attorney, who, in answer to the plaintiff's demand, first pleaded the general issue, and, denying that any portion of the estate except unproductive property can be sold until the whole is sold together at the period pointed out in the will, further averred, that if the estate be not in such condition that the whole property can now be sold in accordance with the wishes of the deceased, neither can the undivided half of the Robinson and Tucker's place be delivered to the petitioner on the terms of the will, till said period arrives. This answer was filed after the homologation of the executor's account.

Experts were appointed to examine the property, ascertain the improvements made thereon since the death of the testator, and appraise its value; but the Judge, *a quo*, being of opinion that this proceeding could not be carried on at the suit of the executor, whose interests under the will are adverse to those of the estate, administered principally for the benefit of the creditors and legatees, and in the absence of said creditors and legatees who are unrepresented in this controversy, and considering that the plaintiff's demand is premature and urged against a succession and parties not properly represented or notified, dismissed the plaintiff's demand

reserving to him all his rights of action under the will, to be exercised at a proper time; and from this judgment the plaintiff has appealed.

We are satisfied, that the judgment complained of is correct. Whatever right the plaintiff, who has the testator's succession under his administration as executor, may have to exercise for his own benefit under the will, it is clear, that he cannot enforce it against himself as executor, nor can he do it in his said capacity, contradictorily only with the counsel appointed to represent the absent heirs. He represents the succession; that is to say, those who have the greatest interest in its being well and faithfully administered, to wit, the creditors and the legatees; and it would be strange indeed, if an executor, or any other administrator, were to be permitted during his administration, either to sue himself as representing the succession, or, by becoming the party plaintiff in his said capacity, to litigate and enforce his private rights against the estate, contradictorily with the counsel of the absent heirs, and in the absence of the creditors and legatees. The heirs of the testator have nothing to do with the succession until it is finally liquidated in due course of administration; their rights are merely residuary; the executor must proceed to the sale of the property and to the payment of the debts of the estate, in the same manner as is prescribed for curators of vacant succession, (Civ. Code, art. 1663); and if the heirs can, at any time, take the seisin from the testamentary executor, they cannot do so without offering a sum sufficient to pay the moveable legacies. Civ. Code, art. 1664. Here, the executor claims a part of the succession property under the will; he seeks to divert it from the mass, and to replace its value by the price fixed in the will by the testator; he himself shows, that the estate is greatly involved; that its indebtedness, exclusive of the legacies, amounts to more than two hundred thousand dollars; that for the purpose of liquidating it, he was continued in his functions as executor; that said succession is in a state of insolvency; and, under such circumstances, it is obvious, that he cannot do any act, except those of administration, or dispose of any of the property by sale or otherwise, without its being done with the consent of the creditors and legatees, or its being ordered by the Probate Court, contradictorily with them. It is true, the testator has fixed the terms of

the sale of the property; but if the estate is in a state of insolvency, as it appears to be, the law requires in such case, that a meeting of the creditors should be called to deliberate on the most advantageous manner of selling its effects; Civ. Code, art. 1160, *et seq.*; and surely they would not be bound by the terms fixed by the testator. This shows, that the application of the executor is irregular and *intempestive;* that he cannot make it as long as he acts as executor, unless it be with the consent of the interested parties, or contradictorily with them; and that the Judge, *a quo*, decided correctly in rejecting his demand.

With regard to the other question growing out of the will, the solution of which is one of the bases of the judgment appealed from, it seems that the same reasoning applies to it. The testator has directed his property to be sold, *as soon as practicable* after the first of January, 1845, and its practicability must necessarily depend upon the situation of the estate, and the requirements of the creditors. They cannot be bound by the dispositions of the will; they have a right to fix their own terms, and to decline to allow the adjudication thereof to be made in the manner pointed out by the testator; and if they think proper, have a right to wait until sufficient revenue is derived from the property to extinguish the outstanding claims against the estate, and to consent, as they have done by not objecting thereto since the institution of this suit, to its continuing to remain under the administration of the executor; and no one else has any right to complain, as this would seem to be within the object contemplated by the testator.

Judgment affirmed.

PIERRE ADOLPHE ROST and another, Testamentary Executors of Stephen Henderson, deceased, *v.* GEORGE HENDERSON and others.

A clause in a will directing that certain slaves shall be emancipated at a future period, and transported to Africa, will not be rendered void by a provision directing, in case of their return to the State, that they shall again become slaves. The illegality of the condition does not render the previous provision null.

Rost and another, Executors, v. Henderson and others.

The testator having provided that ten slaves should be drawn by lot out of the whole number belonging to his estate, and transported to Africa, if willing to go, among the number so drawn was one under eleven years of age. In an action by the executors to compel the heirs of the deceased to give up the slaves so drawn, to be transported as directed by the testator, *Held:* that the slave under eleven years of age, being unable to give his consent, the provision of the will cannot be carried into effect as to him.

APPEAL by the plaintiffs from a judgment of the District Court of the First District, *Buchanan*, J.

MARTIN, J. The late Stephen Henderson, by his last will and testament, directed his executors five years after his decease, to draw by lot out of all his slaves, five males and five females, to be furnished with a free passage to our settlement in Africa, and one hundred dollars each.* This draft took place in due time. In the meanwhile, the heirs made a partition of all the slaves of the estate among themselves. The defendants are the heirs who, under this partition, own part of the slaves designated by the draft to be transported to Africa. The petition concludes with the prayer, that the defendants may be decreed to manumit the slaves in their respective possession, to transport them to Africa, and to furnish them with one hundred dollars each, &c.

The defendants denied their being bound by the will; averred that its provisions are void for uncertainty, contradictory in themselves, and in direct contradiction to the laws. The Attorney General of the State was, on motion of the counsel for the executors, made a party to the suit.

The court gave judgment for the defendants, being of opinion, that the clause in the will respecting the drawing by lot of the slaves, and providing that such of them as may come back from Africa shall return into slavery, is, in its opinion, a condition which is impossible in law; and that, as the whole of the clause must be

* The provision of the will is in these words:

"At the end of the five years as aforesaid, there may be drawn by lot, out of all the slaves, ten—five females and five males, who will be furnished with a free passage to our settlement in Africa, and one hundred dollars each; but they must go of their own free will, and to return back to slavery if ever they return back to this country."

taken together, the illegality or impossibility of any part of it must destroy the whole.

We have been favored with a printed brief endeavoring to support the defendants' conclusions.

We cannot concur in the opinion of the District Judge, that the clause of the will upon which the present action is brought is of no effect, because it contains the condition, that such of the slaves transported to Africa who may come back to this State, shall return into slavery,—a condition impossible in law. He has, however, correctly confined his attention to that portion of the defence which relates to the draft, and to the demand of the executors that the drafted slaves be transported to Africa.

The draft and transportation as ordered by the testator, were legitimate objects of his last will and testament; and the executors properly demand a compliance with that part of his will. If there be other parts of it which are objectionable, as contended by the defendants, it will be time to inquire into their legality when the execution of them shall be sought.

The defendants before us are Stephen Henderson, Jun., and George Henderson, and Caroline Eugenia Henderson, wife of Dr. Wilcox. The first of them is in possession of five of the slaves drafted, to wit: Martha, Sylvia, Giff, Old Leon and Jim Jackson, the youngest of whom (Sylvia) was twelve years of age at the time of the inventory, which we presume, as the instrument is not before us, was made in the year of the testator's death, in 1838, and is now nineteen years of age. The two others are in possession of two of the drafted slaves, *Daniel* and Milly, the first of whom was four years old only at the time of the inventory, and is now about eleven, and, in our opinion, was improperly drafted, as he could not give his consent thereto.

The other three slaves drafted are *Judy* and *Betsey*, who are in the possession of a person not a party to the present suit, and *John Mulatto*, who is in the possession of P. A. Rost, one of the executors and plaintiffs.

The defendants, by the act for the division of the slaves, and to which the executors were parties, bound themselves, in case that portion of the will which relates to the transportation of the slaves to Africa, should be declared valid by the courts having

jurisdiction, to comply therewith, and to support all the charges and expenses attending the execution of the same.

The petition asked, that the defendants should be ordered to manumit the drafted slaves in their possession. The will is silent as to this, and its provisions render the manumission unnecessary.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed; and that, on the demand of the executors, the said Stephen Henderson, Jun., deliver to them for transportation, the slaves Sylvia, Martha, Giff, Old Leon and Jim Jackson, and the said George Henderson, Jun., and Caroline Eugenia Henderson, the slave Milly for the like purpose; and that for each of said slaves respectively, the sum of one hundred dollars be paid by the said defendants, with the expenses of the transportation, that is to say, by the first for five, and by the latter for one of the said slaves, with the costs in both courts.

Maria Balot y Ripoll *v.* Térèsa Moriña and others.

The fact that a nuncupative testament by public act was executed by the testator, under a name which he had assumed for political reasons, and by which he had been known for many years, will not vitiate the will, where the circumstances of the case show, that the name was not used *in fraudem legis*, nor to defeat the rights of his legitimate heirs.

The acknowledgment of an illegitimate child made by the parent in the register of its baptism was sufficient, under the Code of 1808, book 1, tit. 7, art. 25. So under the present Code, art. 221.

Where a testator leaves no legitimate children nor descendants, but legitimate brothers or sisters, or descendants from them, an acknowledged natural child may receive from him, by donation *mortis causa*, one-fourth of his property. C. C. 1473.

Where by a donation *mortis causa* a testator disposes, in favor of an acknowledged natural child, of more than the law allows, the disposition is not null for the whole, but reducible to the *quantum* allowed by law. C. C. 1489.

Defendant, an illegitimate child, duly acknowledged, having been appointed by the testator, who died without other descendants, his universal heir and legatee, and put in possession of the property by the court before which the will was admitted to probate, sold certain land forming part thereof to a third person. In an action subsequently commenced by plaintiffs, who were sisters of the deceased, against the universal legatee and her vendee, claiming each one-half of the suc-

cession: *Held*, that the purchaser cannot have acquired by the sale any greater right than his vendor had to the property; that plaintiffs having survived the testator, he could only dispose of one-fourth of his estate in favor of his natural child; and that the sale made by the latter must be annulled for three-fourths thereof, where the purchaser has not acquired title by the prescription of ten years, if a resident of the State, or twenty years if a non-resident. C. C. 3442, 3450, 3451. But where such property was purchased by a city corporation, for a fair price, to enable it to open a street for the public benefit, the sale will not be annulled, but the legitimate heirs will be left to their recourse against the universal legatee who received the price. C. C. 2604 to 2611.

Appeal from the District Court of the First District, *Buchanan*, J.

Simon, J. The petitioner represents, that she and her sister Catalina Ripoll are the only heirs of Sebastian Ripoll, their brother, who died in New Orleans, on or about the 10th of April, 1836. That the deceased was possessed of a very large estate, composed of real and personal property and slaves, which were inventoried after his death, amounting to a very large sum. That as the sisters of the late Sebastian Ripoll, otherwise known by the name of Francisco Ballesta, they are entitled to inherit from him, each the undivided half of his entire succession; but that it appears, that the said Sebastian, in 1832, made a will under the fictitious name of Francisco Ballesta, by which he gave and bequeathed to a natural child of his, named Térèsa Moriña, the defendant, the whole of his estate.

She further avers, that the deceased, during his last illness, dictated another will to a notary public, by which he acknowledged the petitioner and his sister as his nearest relations, and as such entitled to his inheritance, but that the approaching death of the testator prevented him from signing the same.

That after the death of Sebastian, the first will was admitted to probate, in the Probate Court of New Orleans, and his succession opened under the fictitious name of Francisco Ballesta, although the parties well knew his real name to be Sebastian Ripoll, which could only have been done with a view to conceal his death from his heirs; and that Térèsa and her husband took possession of the estate of said deceased, contrary to law, &c.

The plaintiffs further say, that the will made under the name of Francisco Ballesta is null and void for reasons assigned in the

petition, to wit, 1st. Because it was made under a fictitious name; 2d. Because it was not written as dictated, 3d. Because it was written in French, which language the testator did not understand; 4th. Because Térèsa Moriña, being his natural child, was incapable to take his succession as heir, and was at most entitled to alimony.

They further state, that among the real estate of the said succession, there was a certain lot described in the petition, which was subsequently sold by Térèsa and her husband to the Third Municipality;—another lot, also therein described, which was sold by the same persons to one Juan de Meyra, after having mortgaged the same to Christoval Morel and Bernard Marigny, and which was subsequently seized and sold by virtue of a judgment against said Meyra, &c.;—all which sales and mortgages it is alleged, are null and void as to the plaintiffs and ought to be declared of no effect.

The petitioner therefore prays, that the universal legatee, Térèsa, her husband, and all the vendees and mortgagees of the said property, as also Catalina Ripoll, her sister, may be made defendants in this suit; that a curator, *ad hoc*, may be appointed to represent and defend the latter; that the petitioner be declared to be the lawful heir, for one undivided half of the estate of the deceased; that all the sales and mortgages above mentioned be declared null and void; that she be recognized as the owner for one-half of the said property and of the whole estate; and that Térèsa Moriña and her husband be decreed to restore to her, *in integrum*, her portion of the property of the succession, and to account for the rents and profits; and that the purchasers of the property be also condemned to restore it, or its real value, with rents and profits, &c.

The defendants severed in their answers. Some of them filed divers exceptions, which were subsequently withdrawn, waived, or overruled; but they all answered separately to the merits, as follows:

Térèsa Moriña and her husband pleaded the general issue. Catalina Ripoll, through her curator, *ad hoc*, joined the plaintiff against all the defendants, adopted all the allegations and averments of the petition, and prayed for the same judgment in her

favor as originally prayed for; and further, that a partition of the estate may be made between herself and the plaintiff, in equal portions, &c. The Third Municipality first admitted the purchase of the lot for $5000, by sale made to them by Térèsa Moriña and her husband; but further averred that, at the time of the said sale, there was a judgment of the Probate Court recognizing the vendor as the testamentary heir of Francisco Ballesta, and as being entitled to be put in possession of the property. They further say, that the lot was purchased to improve the Municipality and open Moreau street; that said opening was necessary; that in such case, the plaintiff can have no action against them for the lot which now belongs to the public; and after praying that the plaintiff's demand may be rejected, they call their vendors in warranty to defend this suit, &c.

All the other defendants joined issue by pleading divers matters in avoidance of the plaintiff's action, and in explanation of the origin of the debts for which mortgages were given; and by joining the defendants in asserting and maintaining, that the sale from Térèsa Moriña to Juan de Meyra was legal, and vested the latter with a good and valid title to the property in dispute, and praying accordingly.

Judgment was rendered below in favor of the plaintiff and her sister Catalina, recognizing them to be the legal heirs of Sebastian Ripoll, each for one-half of his succession, and condemning Térèsa Moriña to pay to them jointly the sum of $20,000, being the price of the real estate alienated, with interest, and to deliver to them all the property belonging to the estate, not alienated previous to the bringing of this suit, or, in default thereof, to pay a further sum of $8400, being its appraised value. But judgment was also rendered in favor of the other defendants, purchasers of the property or mortgagees on the same, against the claims set up in the petition against the said parties severally; and from this judgment the plaintiff and her sister Catalina have both appealed.

We are satisfied from the evidence, that the plaintiff and Catalina are the sisters of the deceased, and that they are his nearest legitimate relations legally entitled to inherit from him. He had assumed in Louisiana the name of Francisco Ballesta, but his real name was Sebastian Ripoll, as shown by the testimony of divers

witnesses, who, having known him in this State under the name of Francisco Ballesta, say, that he was the same person they knew in Spain as Sebastian Ripoll. He was born in Cadagues, province of Gerona in Catalonia, in the kingdom of Spain, was known by some of the witnesses from his infancy in his native country, and was afterwards known by them for a great number of years in Louisiana. The certificate of his death shows, that the defendant, Térèsa's husband, who was a relation of the deceased, well knew the fact, as he was born in the same place, and declared to the Register that "*Sebastian Ripoll* alias *Francisco Ballesta, a native of Cadagues in Catalonia, had died in the city of New Orleans, on the* 10*th of April*, 1836, *at five o'clock, A. M. aged about forty-three years*," which corresponds with the testimony of the witnesses examined in Spain.

A projected will of the deceased written under his dictation by a notary, on the 10th of April, 1836, (the day of his death,) but which could not be signed by the testator, was produced in evidence by the plaintiff. Said will establishes the facts, under the solemn declaration of the deceased, then on his death bed, not only that the plaintiff and Catalina were his sisters and his nearest relations, but that his real name being Francisco Sebastian Ripoll y Alloy, certain political reasons had caused him to assume in this city the name of Francisco Ballesta, under which he was generally known here. He states therein, that he was born in the town of Cadagues in Catalonia, names his parents, and gives his age as being about 43 years. This also agrees with the evidence taken in Spain.

The defendant Térèsa Moriña, who was born from an illegitimate connection between the deceased and one Francisca Moriña, his concubine; having been baptized by the curate of the church of St. Louis in New Orleans, on the 20th of February, 1819, was acknowledged by the deceased as being his natural daughter; he signed the certificate of baptism, in which the declaration is made, and also acknowledged her as such in his projected will of the 10th of April, 1836, in which she was again instituted as one of his universal heirs, for one-half.

It further appears, that the first will of the deceased, in which the defendant Térèsa Moriña, is instituted his universal heir and

legatee, was duly probated and ordered to be executed by the Court of Probates; that she was ordered to be put in possession of the estate; and that an inventory thereof was made accordingly. Térèsa was put in possession of the succession by the executor, in 1837, immediately after having received the order of the Probate Court.

With regard to the defence set up by the Third Municipality, it is admitted in the record, that the lot mentioned in the answer of the said Municipality, and in the deed annexed to it, was bought by the Municipality, in accordance with a resolution of the council thereof, from Térèsa Moriña and her husband; which resolutions were made and acted on for the opening of Moreau street for the benefit of the public, and that the price was paid according to the deed; and it is further admitted that Moreau street has been opened, and that a portion of the lot has been used for that purpose.

Under this state of facts, several questions present themselves; to wit: 1st. With regard to the validity of the will of 1832, by virtue of which the estate of the deceased was delivered to the universal legatee therein named.

2d. What is the extent of rights of the universal legatee under said will, she being the testator's acknowledged illegitimate child?

3d. Can those who have purchased property from Térèsa Moriña, who was the apparent heir or universal legatee of the deceased, and who had been put in possession of the estate as such, retain possession of the real estate against the claim of the legal and actual heirs?

4th. Can the plaintiffs disturb the sale made by the apparent heir to the Third Municipality, when it is shown and admitted that such sale was made for public purposes?

I. The will under consideration appears to be in proper form as a nuncupative testament by public act; it is not defective in any of the legal requisites, except that the testator, whose name was *Sebastian Ripoll*, caused it to be executed, and signed it under the assumed name of *Francisco Ballesta*. This last name was not assumed by the testator for the first time when he made his will, for he had always been known in Louisiana under it; so much so, that two of the witnesses who knew him in Spain by

the name of Sebastian Ripoll, testify that, having known him here about thirteen years before his death, he was then called Francisco Ballesta. The deceased himself, it is true, declared his real name to the notary who made his second will, (produced in evidence by the plaintiff,) but he also declared that he was generally known in this city under the name of Francisco Ballesta, which certain political reasons had caused him to assume; and this shows, that said will was not made under a false name, *in fraudem legis*, or with the intention of frustrating the rights of his legitimate heirs, as contended. The change of the testator's name was the result of circumstances of a political nature; he may have thought it necessary at a certain period to assume another name than that which he had when he came to Louisiana, and as he had made himself known under it here, it is not astonishing that he continued to bear it, and that he caused his will to be made under a name under which he was generally known. Under the circumstances disclosed, we are not prepared to say, that the testator's signature of an assumed name is sufficient in itself to vitiate the will; it is at least a sufficient *descriptio personæ*, and perhaps more so here, than if he had signed it under his real name.

II. The disposition by which the testator gave the whole of his estate to Térèsa Moriña, who was his acknowledged illegitimate child, is not void *in toto*, but is only subject to be reduced to the *quantum* which the law permitted the testator to dispose of. She had been acknowledged by him in the registering of her birth or baptism, as being his natural child; this was a sufficient acknowledgment under the laws then in force; (Civ. Code of 1808, p. 48, art. 25;) it would even be sufficient under our present laws. Civ. Code, art. 221. Article 1473 of our Code says, "that when a natural father has not left legitimate children or descendants, the natural child, acknowledged by him, may receive from him, by donation *inter vivos* or *mortis causa*, *one-fourth of his property*, if he leaves legitimate brothers and sisters or descendants from them." Here, the testator disposed of the whole in favor of Térèsa Moriña; but under article 1489 of the Civil Code, "any disposal of property, whether *inter vivos* or *mortis causa*, exceeding the *quantum* of which a person may legally

dispose, is not null, but only reducible to that *quantum*." Thus it is clear, that the defendant Térèsa had a right to inherit one-fourth of her natural father's estate; (*Prevost* v. *Martel*,10 Rob. 512. *Compton et al.* v. *Prescott et al.*, *ante*, p. 56;) and that to the extent of her said fourth in the undivided property, by her sold to the other defendants, the title by her transferred must at least be maintained.

III. The purchasers of the property in dispute contend, however, that having derived their title from the apparent, or reputed heir, or universal legatee of the deceased, without their being aware of the existence of any collateral heir, or of any right in any other person to inherit from him, they cannot suffer, and that their title ought to be maintained, leaving the plaintiff and the other heir to their recourse against the apparent heir for the reimbursement of the price. This is the purport of the judgment appealed from, but it seems to us this question cannot be subject to much difficulty.

There are no maxims or rules better understood in the civil law than these: "*Id quod nostrum est, sine facto nostro ad alium transferri non potest.*" L. 2, ff. De regulis juris; and "*Nemo plus juris in alium transferre potest quam ipse habet.*" L. 54, Ibid. Our Code, art. 2427, declares, that *the sale of a thing belonging to another person, is null;* and art. 3268, informs us, that *such as only have a right that is suspended by a condition, and may be extinguished in certain cases, can only agree to a mortgage subject to the same conditions, and liable to the same extinction.* Here, it is true, Térèsa Moriña, who had been put in possession of the estate, was the only apparent heir of the testator under the decree of the Probate Court ordering the will to be executed, and might have been perhaps fairly supposed to be the exclusive owner of the property purchased; but the purchasers might have also used due precautions to ascertain the extent of her rights. The true name of the testator was then known, not only from the registering of his death, but also from the projected will, which he had been unable to sign. The registering of the universal legatee's birth was a matter of public record; it showed that she was the acknowledged natural child of the testator, and that therefore, her rights as such were

limited, and even contingent to a certain extent. She couldnot be exclusively entitled to inherit, if the testator had left legitimate relations in any degree; (Civ. Code, arts. 1473, 1474;) and this, in our opinion, was in some manner sufficient to put the purchasers on their guard.

But be this as it may, it does not seem to us, that the purchasers of the property in dispute can, under any circumstances, have acquired any greater right, or any better title to it than their vendor herself had. She was only the owner of one undivided fourth of the lots, and she could not validly transfer to them any part thereof, beyond her said fourth. Toullier, vol. 7, No. 31, says: "*Quant aux actes d'aliénation, de constitution d'hypothèque, de servitudes, etc, faits par le propriétaire apparent, ils ne nuisent point au vrai propriétaire réintégré dans ses droits; ils sont résolus, ils s'évanouissent avec le droit de celui qui les a faits, et qui n'a pu transférer à autrui plus de droits qu'il n'en avait lui même.*" See also his appendix to vol. 7, p. 604, in which he controverts the doctrine adopted by Merlin on this subject; and vol. 4, Nos. 288 and 289, in which his opinion on this question is fully developed, under the maxims of the Roman law above quoted. Troplong, Vente, No. 960, and Hypothéques, No. 468, maintains the same doctrine; and so do Duranton and others. It is true, Merlin, in his Rèpertoire de Jurisprudence, *verbo*, Succession, sect. 1, § 5, No. 2, and in Questions de Droit, *verbo*, Héretier, § 3, seems to entertain an opinion somewhat different, on the authority of certain decisions of the Court of Cassation on which he comments; but he only establishes a distinction, and requires conditions which are not recognized by Toullier, to wit, that a sale of this kind should be valid, provided the parties be *in good faith*, and that its invalidity should depend upon the degree of bad faith attending the execution of the contract, in either of the parties or in both. But we are not ready to introduce Merlin's doctrine on this subject into our jurisprudence. We think it is not sound; it violates one of the fundamental rules upon which the right of ownership is based, and we agree with Toullier, *loco citato*, that all that the law has done in favor of a purchaser in good faith, is, to give him *the benefit of the prescription of ten and twenty years*, though

the property so purchased may belong to another person. Civ. Code, art. 3442, 3450, and 3451. "*Hors ce cas*," says Toullier, vol. 4, No. 288, "*la bonne foi de l'acquéreur doit céder au droit de propriété du parent plus proche, du cohéritier, du légataire, &c.*" Thus, we conclude, that Térèsa Moriña, in selling the real property of the succession to her co-defendants, has transferred to them no title beyond her fourth undivided portion; and that the plaintiff and her sister are entitled to recover the three other fourths, unless other circumstances exist which may give validity to any of the sales, as may perhaps be the case with regard to the purchase made by the Third Municipality, which will be the subject of our next inquiry.

IV. The sale of the lot to the Third Municipality was intended for public purposes; it was to open Moreau street, and the lot was bought in accordance with a resolution of the Council, which resolution was adopted for the benefit of the public. Under art. 2604, and the following of the Civil Code, the succession was bound to suffer the compulsory transfer or sale of the lot; and had the heirs been present in the State and in possession of the property, it is clear, that they could not have prevented it, as they were bound to yield the property to the community, if it had become necessary for the general use. The only difference here is, that instead of exercising their right of compulsory transfer, the Municipality purchased the lot from the apparent owner, but it was for the benefit of the public; and there was no necessity, since a resolution had been passed to that effect, to require the fulfilling of formalities which are only to be resorted to when the owner refuses to sell, or demands an exorbitant price. Civ. Code, art. 2605. No proof has been adduced to show that the price paid for said lot was under its real value. On the contrary, the inventory of the estate made in April, 1836, shows the lot to have been then estimated at $1200, whilst the same lot was sold, in December, 1837, to the Municipality for $5000. The apparent heir received the price, and we think that, under the terms of art. 2611, to wit, "If after the expropriation, any individual pretends that he had rights respecting the thing, either as owner or as creditor, he shall have recourse against the person who received the price," which is clearly applicable, under the

admissions, to the present controversy; the only recourse of the appellants is against the apparent universal legatee, for three-fourths of the price in the general settlement of the estate.

On the whole, we must conclude, that the rights of the parties to this controversy should be settled as follows: 1. The sisters of the deceased should recover together three-fourths of his succession in general. 2. The portion of the universal legatee should be limited to one-fourth of the estate. 3. The title transferred to the Third Municipality should be maintained, leaving the heirs to their recourse against the universal legatee for the reimbursement of three-fourths of the price in the general settlement of the estate. 4. The title transferred by the universal legatee to Juan De Meyra, and afterwards from the Sheriff to Stewart Haynes, and the mortgages by her given to C. Morel and B. Marigny, on the lot described in the petition, should be cancelled and set aside for three-fourths thereof, and maintained for one undivided fourth, subject to be divided between the owners thereof according to law, and leaving the purchasers to their recourse in warranty for the said three-fourths of the lot against their warrantors in due course of law. 5. The balance of the estate, yet in the hands of the universal legatee, and undisposed of, should be divided in the same manner, subject to the final settlement of the succession between the parties entitled thereto.

It is, therefore, ordered and decreed, that the judgment of the District Court, so far as it recognizes the right of the appellants to three-fourths of the succession of Sebastian Ripoll *alias* Francisco Ballesta, and so far as it maintains the title transferred by the universal legatee to the Third Municipality with regard to the lot described in the petition, be affirmed; that the same be reversed and avoided in all other respects; and this court proceeding, with regard to all those parts of the judgment appealed from, which have been annulled, to render such judgment as, in its opinion, should have been given below, it is ordered and decreed, that the appellants recover three-fourths of the estate of the deceased in general; that the universal legatee be maintained in her right and title to one-fourth thereof; that the succession be divided and settled accordingly by subsequent proceedings before the inferior tribunal; that the appellants recover of the

actual possessor thereof, three undivided fourths of the lot of ground sold by the universal legatee to Juan De Meyra, and subsequently transferred by the Sheriff to Stewart Haynes; and that this case be remanded to the court, *a qua*, for further proceedings for the final adjustment of the rights of the parties against each other, under the legal principles recognized in this opinion. The costs in this court to be borne by the defendants and appellees.

Schmidt and *Roselius*, for the appellants.

Canon, *Morel*, *F. Haynes* and *Soulé*, for the defendants.

HENRY T. IRISH *v.* JOHN T. WRIGHT and others.

Two distinct actions having been commenced by different plaintiffs against the defendant, attachments were levied at the same time on the same property, which were released on the execution of a single bond for the two cases, conditioned that if said defendants shall satisfy such judgments as may be rendered against them in the suits pending, the said obligations shall be void, otherwise remain in full force, &c. The claim of each plaintiff exceeded the amount of the bond, which was silent as to their respective shares in it. On a rule by one of the plaintiffs against the sureties on the bond to show cause why they should not satisfy a judgment obtained by him, and exception by the sureties that plaintiff, being a joint obligee, could not recover against them without joining his co-obligee; *Held*, that the bond containing distinct obligations to perform different things in favor of different persons, each obligee has a distinct and separate remedy, (C. C. 2074, 2076); but that where one plaintiff proceeds against the sureties, before any decision on the claim of the other, he can recover only one-half of the amount of the bond, reserving his right to recover the balance in case the plaintiff in the other action shall be defeated.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

Peyton, *I. W. Smith* and *Grymes*, for the plaintiff.

T. Slidell, for the appellants.

SIMON, J. It appears from the records, that when the present suit was originally instituted, the plaintiffs sued out an attachment against the defendants' property, which was levied by the Sheriff on divers rights, interest, and moneys, which said defendants had belonging to them in different banks of the city of New Orleans, and in the hands of Bogart & Hawthorn, as also on the steamship New York owned by said defendants, one-fourth belonging

to Wright, and three-fourths belonging to his co-defendants, Haggerty and Morgan. In the mean time another suit was also instituted by one McCaughan, by attachment, against the same defendants, which attachment was also levied on the same property, and in order to obtain the release of both attachments, the defendants executed two bonds in favor of the Sheriff, with Hawthorn and Woods as sureties, conditioned that, whereas by virtue of writs of attachment issued at the suit of H. E. Irish against the said defendants, and at the suit of J. J. McCaughan against the same defendants, certain property therein described had been seized and attached, &c., which attachments were released and set aside, "if said defendants shall satisfy such judgments as may be rendered against them in the suits pending as above mentioned, then the obligations to be void," &c. One of said bonds was executed for the sum of $20,000, by Haggerty and Morgan as principals, and the other bond was executed by Wright as principals for the sum of $10,000, with the same sureties, and they were both executed on the same day.

It appears further, that on the day the Sheriff made the return of the attachments, he made a transfer or assignment of his rights, title and interest in and to the two bonds, to the plaintiffs in the two suits; and that the same were approved by the plaintiff's counsel, who, accordingly, authorized the seizures to be released on the delivery of the said bonds.

The suits went on, and judgment having been rendered in favor of Irish against the defendant Wright for the sum of $13,333 33, (which judgment was subsequently affirmed in June, 1844, by this court on a devolutive appeal taken by Wright,) and in favor of his co-defendants, Haggerty and Morgan, a writ of execution was issued for the benefit of Irish against said Wright, which was returned by the Sheriff; "*No property found;*" whereupon the plaintiff obtained a rule on the sureties, Hawthorn and Woods, to show cause why judgment should not be rendered against them, *in solido*, for the sum of $10,000, in consequence of their being obligated jointly and severally for that amount, as the sureties of Wright, on the bond by him executed for the release of the property attached, and of the judgment rendered against said Wright, which was not and could not be sat-

isfied by the seizure of his property under the execution which had issued for that purpose; by reason whereof the sureties have become liable to pay to the plaintiff the amount of the judgment, or the penalty stipulated in the bond.

Hawthorn and Woods filed their answer to the rule, in which, after excepting to said rule, on the ground that the plaintiff is not competent to maintain it alone, he being a joint obligee with John McCaughan, the plaintiff in the other suit, they deny the allegations of the rule, admitting only as to said obligation what they have admitted of record, and also denying that they are in any wise liable to the plaintiff.

Judgment was rendered below in favor of the plaintiff for the sum of $5000, being one-half of the amount of the bond; and from this judgment Hawthorn and Woods have appealed.

The appellee has prayed in his answer, that the judgment appealed from may be so amended as to allow him the whole amount of the bond.

On the exception of the appellants, which was overruled below, we think the Judge, *a quo*, did not err. It has already been stated, that two suits were instituted in the names of two different plaintiffs against the original defendants, in which writs of attachment were sued out. These attachments were levied on said defendant's interest in the steamship New York, belonging for one-fourth to the defendant Wright, and under the bond sued on, furnished by the latter with the appellants as his sureties, the property attached was released. The Sheriff took only one bond for the two cases, conditioned that the defendant should satisfy such judgments as might be rendered, &c.; and the bond was assigned by the Sheriff to the plaintiffs in the two actions.

It is perhaps true, that in every suit on a contract or obligation in which more than one obligee is named, it is necessary that all the obligees should join to enforce its performance; but a contract may contain distinct obligations to perform different things in favor of different persons; and in such cases, the obligations being several and unconnected, each obligee has his separate and distinct remedy on the obligation which regards him individually. Civ. Code, arts. 2074, 2076. But it is different

when the obligation is contracted for the performance of something for the common benefit of all the obligees. In this case, the suit of Irish had no connection whatever with that of McCaughan; the interest of each is distinct from that of the other, as they sought to obtain distinct and separate judgments against the principal debtor, which judgments, on being respectively rendered in favor of the plaintiffs, the defendants promised to satisfy respectively under the penalty stipulated in the bond. The appellants here, are called upon to satisfy the judgment in favor of Irish; or to pay him the amount of said bond, and we are not prepared to say, that McCaughan has any sort of interest in the object of his demand. The real obligee in this bond was originally the Sheriff, in whose favor it was made; and we concur with the Judge, *a quo*, in the opinion that said bond having been by him assigned to the parties, who are respectively to benefit from it, having a distinct and separate interest in the object for which it was taken, it is clearly analogous and may be fairly compared to a bond given by a sheriff, or other officer, for the faithful discharge of his duties, upon which the law allows to the official creditors of such officer, a distinct and separate right of action. Why should McCaughan join the plaintiff? Nothing shows that any judgment was ever rendered in his favor; and suppose he had never obtained any such judgment as would entitle him to the benefit of the bond, ought the plaintiff to be for ever precluded from exercising his rights upon it, because, forsooth, McCaughan would never be able to join him? Surely not. The plaintiff's rights are distinct and separate, and we are of opinion that they may be enforced against the obligors by a distinct and separate suit.

On the merits, it has been contended by the appellants' counsel, that his clients, as sureties on the attachment bond, are not liable, because the attachment was issued in a suit, the subject matter of which was not a contract, but damages for a tort. Hence, it has been insisted that such a cause of action cannot support an attachment, and that, therefore, the bond given for the property attached is a nullity.

Before investigating the legal question submitted to our solution, and which is one of some importance under our system of

legislation, it is proper and even necessary, that we should advert to the facts relative to the origin of the action, as they appear from the allegations set up in the plaintiff's petition for an attachment, and inquire into the cause of action upon which his claim for damages was based; for, if it be true that the amount sued for, though under the denomination of damages for a tort, is claimed by virtue of an obligation which originated *ex contractu*, and which the defendant became subsequently bound to discharge *ex delicto*, and if such amount is so certain and so specific, as to enable the plaintiff to swear expressly to its existence, and to claim it as a debt, or in the nature of a debt, this would undoubtedly be sufficient to authorize the issuing of a writ of attachment.

The petition in this case alleges, that the defendants *are justly indebted to the plaintiff* in the sum of $13,333 33, which was originally due him by one Alsbury and others, on two promissory notes, each for the sum of $6666 66⅔. That having instituted a suit in the State of Mississippi against his debtors, in which a judgment was expected to be rendered in February, 1842, said Alsbury, to avoid the payment of said debt, and to defeat the process of the court, absconded from said State, and clandestinely ran off his slaves from said State. The petition proceeds to state the facts relative to the negotiation which took place between Alsbury and the defendant Wright, to transport the slaves out of the State of Louisiana on board of the steamer New York; adverts to the circumstances which attended the transportation and its object; alleges that the plaintiff vainly resorted to the issuing of a writ of attachment against said slaves, by process issued against Alsbury from the court of the First District; states further circumstances that followed the suing out of the writ of attachment, and avers, that *he has sustained damages to the sum of* $13,333 33, for the payment of which, the defendants, Wright, and Haggerty and Morgan, have become *liable and indebted, in solido*, to the petitioner, with the interest due thereon by the original debtor; wherefore, he prays that judgment be rendered against them accordingly, &c. The affidavit of the plaintiff, upon which the attachment was granted, states, that the defendants therein named *are justly and truly indebted to him, in solido*, in the just and

full sum of $13,333 33, which he swears *is really due him*, &c. This was the amount of the judgment rendered by the court, *a qua*, in favor of the plaintiff against the defendant, Wright, which was affirmed in this court, (see case of *Irish* v. *Wright et al.* decided in June, 1844,) and which is nothing less than condemning Wright to pay to the plaintiff *the amount of the debt contracted* by Alsbury to the plaintiff, and which Wright had, from his unlawful and fraudulent acts in collusion with the debtor, become liable to discharge by way of damages.

Now, art. 242 of the Code of Practice provides, that "the property of a debtor may be attached in the hands of third persons by his creditors, *in order to secure the payment of a debt, whatever may be its nature*, whether the amount be liquidated or not, provided the term of payment have arrived, and the creditor, who prays for the attachment, *state expressly and positively the amount which he claims;*" and art. 243 requires the creditor *to declare under oath, the amount of the sum due to him.* Under these provisions, very broad in their language, can it be seriously contended that the present case should form an exception to the general rule, and that the law-maker has not intended that a creditor should have the benefit of the writ of attachment, when the debt by him claimed is sought to be recovered in the form and nature of damages? Are not the damages claimed in this suit really a debt due by the defendants, as a consequence of their unlawful acts? and can it be said, that the claim set up against them, though unliquidated, is not sufficiently certain to enable the plaintiff to swear to its precise amount? The allegations of his petition, which were subsequently established, show that he had a right to consider the defendant Wright as his debtor for the whole amount of the debt due by Alsbury, and that the said debt was the foundation of his action; and if so, we cannot entertain any doubt, that his case came under the provision of the Code of Practice which authorizes a creditor to resort to the writ of attachment, for the purpose of securing the payment of a debt, *whatever may be its nature.* A contrary opinion would limit this provision of our law to its most restricted sense or interpretation; when, on the contrary, the will of the legislator appears clearly to be, that it should apply to all sorts or nature of

debts, provided the creditor can state expressly and positively the amount which he claims, and can also swear to the existence of the sum due him. Here, again, the amount claimed as damages was a debt which the plaintiff was seeking to secure and recover; it was expressly and positively stated by him in his petition, and sworn to in his affidavit; and we must conclude, that the attachment which gave rise to the bond sued on, was properly and legally obtained.

This view of the subject renders it necessary to examine the question presented by a comparison of art. 213 of the Code of Practice, in which *damages in general* are provided for when a writ of arrest is sought to be obtained, with art. 242 above quoted. Cases may arise in which the damages claimed could not be considered as a debt, or in the nature of a debt; and such cases perhaps would not come under the application of the article last referred to. Indeed, this appears to be the jurisprudence of this court, so far as it goes; and we are not ready to make it undergo any change or modification, so far as it applies to the kind of causes in which this question was settled. But it is worthy of notice, that the cases referred to by the appellants' counsel, seem to exclude from the attachment law those claims for damages, in which the amount sued for cannot be ascertained, and where such amount is not specific. So, in 1 Mart. 67, the court said, that "the obvious meaning and import of the expressions of the law (then under consideration) confine the case, in which bail is demandable, to suits *for direct and specific injuries, the amount of which may be ascertained*," &c. Also, in 2 Mart. N. S. 325, it was held, that "to require that the damages should be ascertained and made specific by the act of the party sued, would be to render the words of the statute (that of 1817) useless, for the moment this liquidation took place, *they would cease to be damages and become a debt.*" And in 6 Mart. N. S. 564, it was decided, that the law of 1817 did not extend the process of attachment to all cases of damages absolutely, but restricts it *to damages ascertained or specific.* This jurisprudence is in accordance with our interpretation, in this case, of art. 242, which, we think, applies also to cases in which debts ascertained and specific, are sought to be recovered by way of damages; or in which the

damages sued for, the amount whereof is expressly and positively stated and sworn to, are claimed in the nature of a debt.

Having thus disposed of the principal point in controversy, our next inquiry necessarily is, what portion of the amount of the bond is the plaintiff entitled to? The Judge, *a quo*, was of opinion that, as the bond had been made for the benefit of two plaintiffs, each of whose claims exceeds $10,000, one of them could not recover the whole amount of the bond, and leave the other without anything in case he should recover judgment against the defendant in his suit; and that, as the bond did not state their respective shares in the obligation, he should apply the rule prescribed by art. 2081 of the Civil Code, relative to the liability of joint obligors; and he accordingly divided the amount of said bond in two portions, and allowed one-half thereof to the plaintiff. We are of opinion that he decided correctly; but as the judgment rendered in this case exceeds the whole amount of the bond; and as, if the plaintiff had been the only creditor at whose suit the attachment had been sued out, he would have been entitled to the exclusive benefit of said bond, and to the whole amount thereof, we think justice requires, in case it should happen that McCaughan's action should be defeated, and the bond sued on should become unavailable as to him, that the rights of the plaintiff to the recovery of the balance of said bond should be reserved, so as to permit him hereafter to institute proceedings for that purpose.

It is, therefore, ordered and decreed, that the judgment of the Parish Court be affirmed with costs, reserving to the plaintiff his right to sue for and recover of the defendants and appellants, the further sum of $5000, due on the bond sued on, in case said bond should hereafter prove to be unavailable as to J. J. McCaughan or his assignees, for whose benefit it was partly executed by said defendants.

SAME CASE.—ON A RE-HEARING.

A judgment overruling, as coming too late, an exception by the defendant to the legality of an attachment, has the force of *res judicata* as to the surety in the attachment bond.

T. Slidell, for the appellants, Hawthorn and Woods, for a rehearing. The appellants, Hawthorn and Woods, the sureties on the attachment bond, are not liable, because the attachment issued in a suit, the subject matter of which was not a contract, but *damages for a tort*. Such a cause of action cannot support an attachment; and, the bond given for the property attached is a nullity.

There is a distinction between the remedy of arrest, and the remedy of attachment. The Code of Pract. art. 213, says:

"Such *arrest* may be ordered in all demands brought for a *debt*, whether liquidated or not, when the term of payment has expired, and even *for damages* for any injury sustained by the plaintiff either in his *person or property*." Art. 242 of the same Code declares that, "The property of a debtor may be attached in the hands of third persons by his creditor, in order to secure the payment of *a debt*, whatever may be its nature, whether the amount be liquidated or not, *provided the term of payment has arrived*, and the creditor, his agent, or attorney in fact, who prays for the attachment, state expressly and positively the amount which he claims."

In one case the remedy is given for *damages* as well as *debt*; in the other case it is given for *debt only*.

This difference cannot be said to be accidental. It is found in the legislation of this country forty years ago, under the territorial government.

In Martin's Digest, p. 474, we find the act of 1805, prescribing in what cases a writ of arrest may issue. "Whenever a petition is filed for the recovery of any *debt*, or damages on note, bond, contract or open account, or for *damages for injury or detention of the property of the petitioner*," &c.

In the same volume, p. 514, and by the statute of the same year, 1805, the remedy of attachment is given only for *debt*. "Whenever a petition shall be presented for the recovery of a debt." p. 512.

Then as now, an arrest would lie not only for *debt*, but for *damages for a tort*; but an attachment would lie for a *debt* only.

The law of 1817 extended, however, the remedy of attachment to certain cases of *damages*. At page 26, (Statutes of 1817,) it was prescribed in all actions where the sum due is one hundred dollars or upwards, whether upon bond, bill of exchange,

promissory note, or liquidated account, and in every case where the amount of the *debt, damages*, or demand is ascertained and specific, the plaintiff may have an attachment, &c.

But the Code of Practice, repealing the law of 1817, restored the old law, and while it provided the writ of arrest both for *debt* and *damages for wrongs*, gave the writ of attachment for *debt* only.

The French text of art. 242, which will be found to be the same in that respect with art. 213, shows that the words "*whatever may be its nature*," in the latter article refer to the fact of the debts being liquidated or not.

ART. 213. Cette arrestation peut être ordonnée *pour toute espèce de dettes échues liquides ou non liquides*, et même pour tous dommages et intérêts qui seraient réclamés par le demandeur pour un tort qui aurait été causé à sa personne ou dans ses biens.

ART. 242. On peut faire une saisie arrêt pour paiement *de toute espèce de dettes liquides ou non liquides, pourvu qu'elles soient échues*, et que le créancier qui sollicite saisie-arrêt, ou son agent ou fondé de pouvoir, allègue d'une maniere expresse et positive qu'elle est la somme qu'il réclame.

This provision, as to liquidation, was introduced from the fact, that the point had been disputed whether any thing but a liquidated indebtedness would sustain an attachment. See Sergeant on Attachment, p. 44 to 51.

The correctness of this position will be found in the origin of our attachment law. This remedy was derived from the other States of the Union. Of the truth of this assertion the phraseology of the statute of 1805, and especially the form and language of the writ prescribed therein, (Martin's Digest, p. 514,) furnishes abundant internal evidence. There, a debt is inseparable froma contract, and without a contract cannot be created; Sergeant on Attachment, p. 51; and an attachment in an action for a demand *ex delicto*, is unknown. See the cases collected in Wharton's Digest of Pennsylvania Reports, to wit: 2 W. C. C. R. 382, Sergeant on Attachment, 44 and 45, 2 Br. Appx. 28, S. P. 2 Br. 62, 5 S. & R. 450, 1 M. 312. In the last case the attaching creditor sued upon a claim which arose thus: A. had stolen from the agent of a bank a quantity of notes, and it was held that the bank could not maintain against A. a foreign attachment for the amount thereof, because the foundation of the claim is *ex delicto*. The counsel for plaintiff argued that "the act of Assembly granting the writ is a remedial law, and should receive a liberal construction. Section 3d has the words 'debt or other demand.'" But thecourt, after disposing of other points in the cause, proceeds to

say: "But we do not decide these questions. An insuperable difficulty in the plaintiff's way arises from the act of 1705. The use of the process of attachment for the commencement of an action, is not commensurate with that of summons. It is limited in respect to persons, to non-residents, and in respect to the cause of action, to *debts* contracted or owing, which, by the interpretation of the courts, is extended to all actions arising *ex contractu*, but no further. The cause of action shown in this case is not of this description. The action of debt is founded upon an express contract, and it lies by reason of a breach of contract. 1 Esp. Dig. 172 2 Dall. 173. 2 Rolle's Rep. 44. 2 Wash. C. C. Rep. 386. 2 Browne's Rep. appx. 38. In this case the action arises *ex delicto*, from a tort committed under circumstances and with an intent which amounts to crime. It is not an answer to say that the plaintiff may waive the tort. Perhaps he may do so, as it respects the action, (although that is a point which we do not decide,) still he cannot do so as it respects this process. The reason is, the act of 1805 does not apply to the form of the action, but to the *cause* of the action. The form of the action may be debt, *indebitatus assumpsit*, or on the case, but the cause of the action must arise from a contract."

So in New York, a demand, *ex delicto*, will not support a foreign attachment. 3 Caines' Reports, 258.

The court has at all times held, that the remedies of arrest and attachment, being onerous, must be strictly construed.

In 1 Martin, 65, is the case of a writ of arrest issued in a suit claiming damages for slander. The law of 1805 allowed an arrest for "damages or injury to or detention of the *property* of the petitioner." The arrest was set aside, because such damages as were claimed were not within the statute, being damages for an injury to the person.

In 2 Mart. N. S. 325, the court again recognized that some cases of damages were without the statute.

In 6 Mart. N. S. the court refused to sustain an attachment in an action for slander. "Some cases of damages are certainly excluded. The exclusion does not appear to us too broad, and it is necessary to give effect to the words of the legislator."

In 3 Robinson, 233, the court said, "We are by no means disposed to relax any thing of the *strictness and rigor with which we have heretofore construed our attachment laws.* The remedy they provide, is in itself, *a harsh and extraordinary one*, and those who resort to it, have no right to complain if they are held to a *strict* compliance with all the requirements of our statutes on the subject." See also 8 La. 586.

So in 3 La. 18, the court said, "Whatever may be the general doctrine of nullity, relating to contracts or judicial proceedings, in

ordinary cases, it is believed that in the extraordinary remedy by attachment, all the forms prescribed by law must be strictly pursued, on pain of *nullity* as a consequence of their neglect."

The court admits, that the main action against Wright was an action for damages sustained by the tortious conduct of Wright. But it argues, that the damages were sustained by the plaintiff with reference to a *debt* due to him by Alsbury. Wright was alleged to have assisted Alsbury in evading an attachment issued against his property. Because his attachment was evaded, plaintiff alleged that he failed to collect his debt of Alsbury, and that Wright by his co-operation, in the evasion of the attachment, made himself responsible to the extent of the debt. The court does not of course say, that the conduct of Wright amounted in law, to a contract to assume Alsbury's debt, but that the law inflicts upon him, a responsibility in damages for the wrong done. Do those damages arise from contract, or *ex delicto?* If from the former, the remedy by attachment is given, if from the latter, it is not.

2d. If the bond be not a nullity, what is the liability of the sureties to the plaintiff in this suit? Two attachments having been levied simultaneously on the same property by the two plaintiffs, Irish and McCaughan, one bond of $10,000 was given, conditioned to satisfy such judgment as might be rendered in the two suits. Both plaintiffs were therefore interested in this bond. What is the nature of this interest?

The court below decreed, that each was interested for one moiety, or $5000 under the art. 2081 of the Civil Code. This court says the article was properly applied by the Parish Judge. If so, how is this reconcileable with the decision which gives Irish a contingent residuary interest in the remaining $5000, if not hereafter absorbed by a successful result of McCaughan's suit? If the article 2081 determines the nature of the obligation, Irish has no interest beyond the virile share.

Irish's suit was for $13,333 33; McCaughan's for $15,000. The bond was so taken by consent of both plaintiffs, as appears by the endorsement of their counsel on the bond itself. The natural inference is, that they were to share *pro rata*. If so, Irish was not entitled to as much as $5000, or one moiety. Yet this amount is now absolutely awarded to him, in a proceeding to which, notwithstanding the exception of appellants, McCaughan was not made party.

Should McCaughan recover a judgment for his whole claim, to wit, $15,000, receiving but $5000, the residue of the bond, he will obtain a less dividend than Irish. Yet the property was in *custodia legis* for the benefit of both, by process simultaneously levied. How is this case distinguishable from a case of insol-

vency, where the property is in custody of law for the benefit of creditors? There, the division is not made by virile shares, but *pro rata*. How is the case distinguishable from a seizure under two writs of execution simultaneously levied? Certainly in such a case, the distribution would be *pro rata*.

"The bond is a substitute for the property." *Dorr* v. *Kershaw*, 18 La. 58. In the analogous case of a twelve month bond for property sold under execution, 1 Robinson, 397, the court said; "It is clear, that this bond in the hands of the marshal, represented the whole price of the property sold, and belonged to the several parties having an interest in it, according to their right in the property itself."

If the interest of the parties be for virile shares, the reservation to Irish of a residuary interest is erroneous. If it be a bond available according to the amounts claimed *pro rata*, judgment has been given for too much. If it be a bond whose amount is distributable *pro rata*, according to the claims of the parties as finally adjudged, then an *ex parte* application was irregular and the proceeding premature.

Simon, J. Our object in granting a re-hearing in this cause, was mainly to afford us an opportunity of reviewing our decision on the question whether, under art. 242 of the Code of Practice, an attachment could properly and legally issue on a cause of action not originating in a contract, but based upon a claim for damages? We have attentively re-examined this important question; and although we were originally impressed with the idea that the plaintiff's demand in the case in which the bond sued on was given, though sounding in damages, was virtually for the payment or recovery of a debt due to him by the party who, from his unlawful act, had become responsible for its amount, and bound to discharge it by way of damages, we must confess that we are not sufficiently satisfied with our previous opinion, and that, were it not that the consideration of another question raised in the cause, has brought us to the conclusion that our first judgment ought not to be changed, we should have felt inclined to overrule it, and to decide that the attachment originally issued, had been illegally and improperly sued out. The question is therefore left open, as not definitively settled, and we shall now proceed to give our reasons why we think that, whatever be its solution, the defendants and appellants are now precluded from availing themselves of the exception upon which it is based.

The defendants being sued as the sureties of Wright, the principal obligor in the attachment bond, we have ascertained that the in suit instituted by the plaintiff against Wright, in which the attachment was issued, the same exception was pleaded by the latter and his co-defendants, as one of the grounds upon which they attempted to obtain the release of said attachment. On referring to the record of the attachment suit, we have found that a rule was obtained by Wright, on the 11th of January, 1842, on the plaintiff, to show cause why the attachment should not be set aside, on the ground, among others, that the attachment had been illegally issued; on the next day, another rule was taken by the defendant to be permitted to bond the property attached, without prejudice to the first rule; this was granted in the 14th, and the bond sued on was subsequently furnished accordingly. On the 12th of February the trial of the exception came on before the inferior court, which, being of opinion "*that an attachment could issue on the claim set forth in the plaintiff's petition*, Code of Pract. art. 242," overruled the exception, and maintained the attachment in its full legal effect. An appeal was taken from the judgment rendered on the merits against Wright, and the case having been brought before this court, the question was renewed and insisted on by the appellant's counsel, orally and in writing; when it was decided, that *the objection came too late, as the case was at issue on its merits, and the property attached bonded.* See the case of *Irish* v. *Wright et al.*, decided in June, 1844. The defendant's counsel, however, made an application for a re-hearing on the same point, suggesting the fact, that the property was bonded without prejudice to his rights in the rule for dissolution; but it was refused, as it was then considered that said defendant having filed his answer to the merits on the first of February, about twelve days previous to the action of the lower court on the exception and to the judgment rendered thereon, his said answer was a waiver of the exceptions by him previously pleaded. Thus, both courts have already passed upon this exception as to the principal obligor, and the question occurs; can it now be renewed and set up by his sureties? or, in other words, is it not *res judicata* against the latter, as well as against Wright?

We think it is. It is clear that the judgment rendered against

the principal obligor, overruling an exception upon which the validity of the bond sued on depended, and therefore the liability of the parties thereto, has acquired the force and effect of *res judicata;* it was definitive at the time this suit was instituted, with regard to Wright, and has become so with regard to all other parties therein interested, by the elapsing of the time allowed by law for appealing therefrom. The defendants did not even plead the exception in the lower court; the question was not raised there; and it was only on their appeal before this court, that they made the suggestion that the attachment, in consequence of which the bond sued on was given, had been illegally issued, as the plaintiff's claim was one in damages for *a tort.*

Now, it is a well recognized doctrine that the obligation of a surety, not existing without that of a principal obligor, the contract of suretyship must be governed by the extent of the obligations of the principal debtor; it cannot exceed the amount due under the principal contract, nor can it be contracted under more onerous conditions; and it follows, therefore, that if a judgment be rendered in favor of the principal debtor against the creditor, such judgment must have the force of *res judicata* in favor of the surety, provided it be not the result of personal exceptions which such principal debtor alone may be entitled to plead. "*On a donc considéré*, says Toullier, Vol. 10, No. 209, *la caution comme étant la même partie que le débiteur à l'égard de tous les jugemens qui la rendent moins onéreuse.*" In No. 210, he says: "Vice versa, *le jugement rendu contre le débiteur en faveur du créancier peut être opposé à la caution, et déclaré exécutoire contre elle; mais elle peut s'en porter appelante.*" Such is the opinion of Pothier, Obligations, Vol. 2, p. 299, No. 61, who considers that the obligation of a surety, depending upon that of the principal debtor, to which it is a mere accessory, such surety ought to be viewed as being the same party with such principal debtor, with regard to all that may be judicially decided (*jugé*) for or against the principal obligor. See also ff. l. 21, § 4, De except. rei jud. Civ. Code, arts. 3006, 3029. This doctrine is very clear, and is fully applicable to this case, for, if it were otherwise, we would have here the anomaly, as has been well remarked by the plaintiff's counsel, that by the judgment against the defend-

ant, the attachment would be maintained, and the property seized made liable for its satisfaction; and yet the bond which represents the property would be declared to be a nullity, and the sureties discharged. This cannot receive our sanction; and we must hold the appellants liable under the judgment rendered in favor of the plaintiff against the principal debtor; said judgment having the force of *res judicata* against all the parties therein concerned.

With regard to the reservation made in our first judgment in relation to the other half of the amount of the bond sued on, in case it should not be recovered by M'Caughan, we see no reason why it should not be maintained. It seems to us that, as we have already said, if the plaintiff had been the only creditor at whose suit the attachment had been sued out, he would be entitled to the exclusive benefit of the bond, and to the whole amount thereof, and that he ought not to be deprived of such benefit, if it turns out subsequently that M'Caughan cannot recover the portion reserved for him in consequence of his attachment. Such portion would have accrued to the plaintiff in this suit, if M'Caughan had not sued out his simultaneous attachment; it is not sufficient to satisfy the plaintiff's judgment; the bond represents the property attached, and the principal defendant cannot have any right to recover any part of the property attached, or be dispensed from paying any part of the amount of the bond, unless there be a surplus over and above the sum to be recovered.

It is, therefore, ordered that our first judgment remain undisturbed.

THE COMMISSIONERS OF THE EXCHANGE AND BANKING COMPANY OF NEW ORLEANS *v.* CATHARINE BEIN and another.

Property purchased under the authority of the husband in the name of a wife, between whom and her husband there existed a community of *acquests*, but not paid for with her paraphernal funds under her separate administration, nor received by her as a *dation en payement* from a debtor of a separate and paraphernal claim, belongs to the community. The contract is as binding on the com-

munity as if made by the husband, and the wife neither becomes the owner of the property nor incurs any personal responsibility therefor, (C. C. 2371, 2372, 2375, 2378, 2379, 2393); nor could she in any manner bind herself with her husband for the payment of the price. C. C. 2412.

The 27th section of the statute of 1st April, 1835, incorporating the Exchange and Banking Company of New Orleans, authorizing a "wife to bind herself jointly and *in solido* with her husband in all hypothecary contracts or obligations entered into by him in favor of that institution," does not empower a wife to bind herself with her husband, for the price of stock of the company, purchased in her name during the existence of the matrimonial community. *Per Curiam*: The provision in favor of the bank being in derogation of the general rule prescribed by art. 2412 of the Civil Code, must be strictly construed. It cannot be extended to cases not clearly within its purview.

APPEAL from the District Court of the First District, *Buchanan*, J.

Bonford, for the appellants.

Wray and *Roselius*, for the defendants.

F. B. Conrad, for Adams. It is contended that the defendant is a married woman, and that, as there is no evidence that the "contract was converted to her benefit," she is not bound by it.

This argument is founded on some decisions heretofore rendered by this court. Upon reference to those cases, it will be found, that they all refer to the case of *Durnford* v. *Gross and Wife*, 7 Mart. 465. That case was decided under the Spanish law, and is based exclusively on the 61st Law of Toro, of which it quotes the very words; but that law was repealed in 1828, and our present laws contain no restriction on the power of married women to contract, such as was contained in it, to wit: "*that the contract must be proven to be beneficial to them.*" On the contrary, under our present system, the law on this subject is, that *married women may contract in all cases with the consent of their husbands.* Civ. Code, arts. 1775, 1779. She may purchase for the community. Civ. Code, art. 2371. Our whole legislation on the subject of the relations of married persons clearly recognizes the full capacity of the wife to contract, when authorized by her husband, and if separated from him in bed and board, without his authority. Civ. Code, art. 125. Nay, so far from imposing upon her the restrictions contended for by defendant's counsel, the law even goes the length of enabling a married woman, if she be a public merchant, to contract, without being empowered

by her husband. Civ. Code, art. 128. Speaking of the community, our Code says, that it consists of property acquired during the marriage, "even although the purchase be only in the name of one of the two." Art. 2371. All these articles demonstrate the policy of our present laws to be, to enable the wife to contract in all cases with the authority of the husband; and nowhere in the Code can the restriction of the Spanish law be found, that the contract must be shown to have enured to her separate benefit. On the other hand, it is equally clear, that any debts thus contracted by her are community debts. Civ. Code, art. 2372. Code Nap. 1409, 1426. Consequently she may escape responsibility *ultra vires* of the community, by obtaining a separation of property during the marriage; (Civ. Code, arts. 2399, 2404;) or by renouncing the community after the dissolution. Art. 2379.

Art. 2412 is explained by art. 1784. They are both intended to prohibit married women from becoming sureties for the debts of their husbands. It is not pretended that such was the case in the present instance. On the contrary, the defendant's answer and the evidence show, that the note was given for a debt of her own. If the wife could make the contract at all, certainly her husband's joining her in it did not affect its validity. If she could give a stranger as her security or endorser, certainly she could give her husband.

The question as to the ultimate liability of the wife beyond the assets of the community, can in no degree affect the legal character of the contract. Is the contract such a one as the wife, under our present system of laws, could, with the authority of her husband, enter into? This is one question. How can the wife exonerate herself from the obligation incurred by the contract? That is another and a very different question. The fact of the wife being able hereafter to shield herself from personal responsibility by obtaining a separation of property, or by renouncing the community, is not at all inconsistent with the proposition that the contract, *per se*, is legal, and one which she is perfectly competent to make. *Non constat*, that the community is not amply sufficient to meet the obligation. And *non constat*, that the wife, even if the community should prove insufficient,

will renounce. The future action of the defendant has nothing to do with her capacity to make this contract; and whether she can hereafter devise means to escape any responsibility, beyond the assets of the community, is a question which may arise at the proper time. "Sufficient for the day is the evil thereof."

MORPHY, J. This suit was brought upon a protested note for $16,000, drawn by the defendant to the order of, and endorsed by, John D. Bein, her husband. A judgment by default was entered up against both of the defendants. On its being made final, an appeal was taken by Catharine Bein. It is urged in her behalf in this court, that the note drawn by her in favor of her husband was a nullity in his hands, and that the rights of the plaintiffs, to whom he had endorsed it, were no better than his. There being no evidence in the record of the circumstances under which the contract had been made, the cause was remanded with a view to allow the plaintiffs an opportunity of placing before us all the facts in relation to it, and of showing, if they could, that the present was one of those cases in which a married woman can validly bind herself with her husband under their charter. 4 Rob. 225. It appears from the record now brought up, that, on or about the 17th of November, 1841, C. Adams, Jun., being the owner of six hundred and forty shares of the capital stock of the Exchange Bank, and being desirous of transferring them to the defendant, Catharine Bein, applied to the board to substitute her name to his on a stock note for $16,000, which he owed to the Bank, that sum being the price she had agreed to pay for the stock. The application having been granted, the stock was transferred to the defendant, Catharine Bein, on the books of the corporation. She pledged it to the Bank, and offered for discount upon this pledge a note, of which the one now sued on is a renewal. It was discounted, and the proceeds placed to her credit. She drew a check for the amount, and with it Adams took up his note. At the meeting of the board which granted Adams' application and discounted the note, there were only four directors present. It it not shown that the defendant, Catharine, was ever separated in property from her husband, John D. Bein, who, after paying $3000 on the note sued on, became a bankrupt on the 6th of December, 1842, and was dis-

charged from all debts contracted prior to that date. There was a judgment below in favor of the defendant, and the plaintiffs appealed.

There being a community of gains and *acquests* between Catharine Bein and her husband, any property purchased during the marriage belonged of right to such community, of which he was the head and master. It matters not, according to art. 2371 of the Civ. Code, whether the purchase be made in the name of one of the spouses or of both. In like manner all debts contracted during the marriage, were community debts. Art. 2372. If a purchase is made, or a debt contracted in the name of the wife, duly authorized by her husband, the contract is valid, and is as binding on the community as if it had been made by the husband himself; but the wife thereby incurs no personal responsibility, nor does she become the owner of the property thus bought. This court has, however, often recognized an exception to this general rule, in relation to the purchase of property in the name of the wife: when it is paid for with her paraphernal funds under her separate administration, or when it is received as a *dation en payement*, made to her by a debtor of a separate and paraphernal claim of hers, the property does not belong to the community, but she becomes the separate and exclusive owner of it. 1 La. 521. 17 La. 300. 1 Rob. 367. In the present case, the stock purchased during the marriage has not been paid for by the wife, in whose name it was bought; a part of the price has been paid by the husband; and the question is, whether she can be personally held for the balance. We are clearly of opinion that she cannot. If, on the one hand, the wife, as long as the community exists, can make no claim to any part of its property; she cannot, on the other hand, be sued for any of its debts, for which the husband, as the head and master of the community, is alone responsible. Her interest in the community is only eventual and contingent, and is to be ascertained upon its dissolution; it is only then that she becomes entitled to one-half of the property, and at the same time responsible for one-half of the debts, (Civ. Code, arts. 2375, 2378); but she then has the privilege of exonerating herself from such debts, by renouncing the partnership or community of gains. Ib. art. 2379. If, before

the dissolution of the community by the death of one of the spouses, the wife has the right of praying for a separation of property, it is not to release herself from any personal liability for the debts of the community, because she can incur none; but it is to protect her dowry and other claims when the disorder of the affairs of her husband induces her to fear that they might be endangered. Ib. art. 2393. If then the defendant, Catharine Bein, has clearly incurred no personal responsibility by the mere fact of contracting this debt in her own name, because it is a community debt, it is equally clear that she could not, in any manner, bind herself with her husband for the payment of the same. Ib. art. 2412. 1 Rob. 218. 4 Rob. 115. It is, moreover, in evidence, that John D. Bein, the head of the community, has been discharged from all its debts under a decree of bankruptcy. It is difficult to perceive how the defendant, Catharine Bein, can have remained responsible for this community debt, when it has, with all others contracted before the 6th of December, 1842, been discharged and extinguished. But it is urged, that the language of the 27th section of the charter of the Exchange Bank is broad enough to cover all obligations entered into by the wife with her husband, even for his, or the community's debts. We do not think so. The section relied on provides, "that *in all hypothecary contracts or obligations* entered into by any individual with, or in favor of, the president and directors of the Exchange Bank, *according to the true intent and meaning of this act*, it shall be lawful for the wife of such individual to bind herself jointly and *in solido* with him," &c. The terms of this enactment clearly restrict it to the class of contracts and obligations therein described; and a reference to the 10th section of the same charter, which authorizes loans on land and slaves to be secured by mortgage, shows what were the *hypothecary contracts and obligations* that might be entered into according to the true intent and meaning of the act. The language used surely excludes the idea, that the wife could bind herself with her husband, in all kinds of contracts or obligations whatever. Some reliance is placed upon the French text of the charter, in which the term *obligations* does not seem to be qualified by the expression *hypothécaires*; but on an examination of other charters, contain-

ing similar provisions in relation to married women, it will be seen, that the French text relied on is a bad translation of the English, which appears to us free from any ambiguity; but even if there were any doubt, this provision in favor of the Bank being in derogation of the general rule as laid down in art. 2412 of the Civ. Code, should be strictly construed, and should not be made to extend to cases not coming clearly within its purview. Under this view of the subject, we have found it unnecessary to inquire into the question raised as to the illegality of the transfer of the stock, and the consequent want of consideration of the note sued on.

*Judgment affirmed.**

SUCCESSION OF JEAN MAGER—AGATHÉ ALEXANDRINE COLLARD, Universal Legatee, Appellant.

The 4th section of the act of 26th March, 1842, chap. 154, imposing a tax of ten per cent on all sums, or on the value of all property received by any non-resident alien, as heir, donee or legatee, from any succession opened in this State, or on so much thereof as may situated in this State, is not inconsistent with sections 8, 10, of article 1 of the Constitution of the United States, nor with any treaty or act of Congress.

A donation *mortis causa* may be made in favor of a foreigner, where the laws of his country do not prohibit a similar disposition from being made in favor of a citizen of this State.

The State is entitled to a succession only in case of there being no lawful relation, husband or wife, or acknowledged natural child of the deceased, or of its not being claimed by any one entitled thereto. C. C. 477, 911, 923.

APPEAL from the Court of Probates of New Orleans, *Bermudez*, J.

Grima, testamentary executor, *pro se*.

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* *Bonford*, prayed for a re-hearing, for the purpose of obtaining a modification of the judgment so as to leave the rights of the Bank against Adams unaffected, by declaring the contract between them and the defendants absolutely void; contending that there was no contract for the want of consent, the Bank and Adams never having intended to contract with Catharine Bein as the agent of her husband, or as representing the community.

Re-hearing refused.

Denis and *Petot*, for the appellant, contended that the act of 26 March, 1842, § 4, is unconstitutional. Const. N. S. art. 1, § 8, 9, 10. 1 Kent's Comm. 425 to 428. 2 Story on Const. 1030 to 1035. *Brown* v. *State of Maryland*, 12 Wheat. 419.

Preston, Attorney General for the State, and *Musson* and *Pepin*, on the same side, contended that the legacy to the appellant was void, as Mager could not, by the laws of France, have inherited from her. Mager having been naturalized in the United States without the consent of the French government, ceased to have a right to inherit from any French subject. Imperial decrees of 1809 and 1811. Code Nap. art. 17; and Boileux Comm. thereon. 1 Duranton, No. 173. Delvincourt, book 1, p. 19. Okey, Law, Usage and Custom, p. 15. The decrees of 1809 and 1811 have never been repealed. Journal du Palais for 1826, 26 July, and 27 May. Ibid. for 1829, 26 June. Ibid. for 1834, 19 March and 14 May. Ibid. for 1841, 18 June.

The reciprocity required by art. 1477, of the Civil Code of this State, corresponding to art. 912 of the Code Napoleon, says Toullier, "*est exigée non seulement de nation à nation, mais même de particulier à particulier.*" Vol. 4, No. 102. See also Grenier, des Donations, pp. 57, 243–6. Journ. du Palais, 24 Avril, 1808. 1 Fevrier, 1813.

MORPHY, J. On rendering an account of his administration, the testamentary executor of this estate mentioned at the foot of it, that from the balance of $91,950 49, accruing to the widow Collard, the sister and universal legatee of the deceased, a non-resident alien, there was to be deducted the tax of ten per cent thereon, imposed by the law of the 26th of March, 1842, on property inherited by, or bequeathed to any person not domiciliated in this State, and not being a citizen of any State or Territory in the Union. The universal legatee objected to the tax charged on the amount accruing to her, on the ground, that said tax was contrary to, and in violation of the constitution of the United States, and prayed that it might be stricken out of the executor's account. An opposition was then made in the name of the State Treasurer, in which the Attorney General joined, claiming on behalf of the State of Louisiana, the whole succession of Jean Mager, on the ground that the deceased, who was born a French

subject, became by naturalization a citizen of the United States, without the consent or authorization of his government; that by this fact, he forfeited under the laws of France, all right of inheriting, or receiving donations, *inter vivos* or *causa mortis*, from his sister, the widow Collard, or from any other person in France; that by our laws, donations *inter vivos* and *mortis causa* cannot be made in favor of a foreigner, where the laws of his country prohibit similar dispositions from being made in favor of a citizen of this State. And that by reason of the reciprocity thus established, the widow Collard should not be permitted to take the legacy made to her by her brother, but that the same should go to, and be paid into the State Treasury. The Probate Judge rejected both oppositions, and ordered the account to be homologated. From this judgment the universal legatee has appealed; and in this court the Attorney General has asked, that it be affirmed so far as it maintains the tax in favor of the State, and that it be amended, so as to annul the legacy made to the widow Collard, and to decree the whole estate of the deceased to the State of Louisiana.

This court, on various occasions, has been called upon to decide questions arising under the law of the 26th of March, 1842, and the former law of 1828, imposing a tax on property inherited by, or bequeathed to non-resident aliens; and we are not aware that the constitutionality of those laws has ever been questioned. 6 La. 336, 561. 6 Rob. 504, 509. 9 Rob. 357. But it is now urged, that this tax is contrary to, and in violation of the constitution of the United States; and we are referred to the eighth and tenth sections of the first article of that instrument. After a careful examination of the provisions therein contained, we are unable to see in what manner, either their letter, or even their spirit has been violated. We hold it to be an undeniable proposition, that each State of this Union, by virtue of its sovereignty, has the power to tax all persons and property within its limits, and that this right remains in the States concurrent and co-existent with that of Congress, with the sole exception of duties on imports and exports, which the constitution has taken from the States, unless exercised with the consent of Congress. It cannot have been seriously urged by counsel, that the tax in question must be view-

ed as an impost, or duty on imports and exports. By way of illustration, they have supposed the case of a foreign merchant dying here shortly after having imported a large quantity of goods, which would be subject to this tax, although duties had already been paid to the general government, and that of foreign heirs wishing to export the money or effects bequeathed to them, which they could not do without paying this tax. To this the answer is obvious. The tax is not imposed because the goods have been imported, or because the foreign heirs wish to export the money or effects bequeathed to them; but because in both of the cases supposed, the property taxed is found in a succession opened in this State, and claimed by foreigners, whose right to inherit the same being derived from the laws of the State, can unquestionably be curtailed by posterior laws. The tax to which the Legislature have seen fit to subject the right of aliens to inherit property in this State, is due, whether such property has been imported or not, and whether the foreign heirs intend to export it or to leave it in the country. The accidental circumstance of the property having been imported recently, or being intended to be exported, cannot surely affect or diminish the right of the State to tax it, by bringing it within the constitutional prohibition on the States to lay a duty on imports and exports. The case of *Brown* v. *The State of Maryland*, quoted from 12 Wheaton, has no analogy to the present. The State of Maryland had passed an act requiring all importers of foreign goods by the bale or package, &c., to take out a license for which they should pay fifty dollars, &c. The grounds upon which the court put that case, were: "That sale is the object of all importation of goods; that, therefore, the power to allow importation implied the power to authorize the sale of the thing imported; that a penalty inflicted for selling an article in the character of an importer, was in opposition to the act of Congress which authorized importation under the authority to regulate commerce; that a power to tax an article in the hands of the importer the instant it was landed, was the same in effect as a power to tax it whilst entering the port; that consequently the law of Maryland, was obnoxious to the charge of unconstitutionality, on the ground of its violating two provisions of the constitution, the one giving to Congress the

power to regulate commerce, the other forbidding the States from taxing imports." It is not pretended that the tax in question interferes with, or is contrary to any law of Congress regulating commerce, or any treaty subsisting between France and the United States, stipulating that no such tax shall be laid on the property of successions opened in either country, which may be claimed by inheritance or bequest, by the citizens of the other. Far from this being the case, it is admitted on the record, "that by the laws of France a tax or duty of six and a half per cent would be levied by the French government, on an inheritance falling to an American citizen, in the same degree of relationship to a deceased French subject, as the opponent and universal legatee in this case bore to the late Jean Mager, the testator." We conclude then, that the State of Louisiana having clearly acted within the scope of its powers in passing the statute of 1842, it must be carried into effect, until some treaty is made, or some law is passed by Congress, inconsistent with its provisions. In the event of such a collision, the law of the State will have to yield, and become inoperative.

The opposition made on behalf of the State has no better foundation than that of the universal legatee. It is based on article 1477 of the Civil Code of this State, and on two imperial decrees passed by the French government in 1809 and 1811, whereby it was provided, among other things, that if any French subject caused himself to be naturalized in a foreign conntry, without the consent of his government, he should incur the forfeiture of his property in France, should lose the right of inheriting, and that all successions opening in his favor should pass to the nearest heir, after him, entitled to take, &c. Art. 6, tit. 2, of the decree of 1811. It is argued, that as Mager, who was born in France, and who became naturalized here without the consent of the French government, could not have inherited from his sister, the widow Collard, had he been her nearest heir, she, under the principle of reciprocity established by the article above quoted, should not be permitted to receive any bequest from him. It is in the first place extremely doubtful, whether the harsh decrees referred to have at the present time any force or validity, even in France. There is on this subject great diversity of views among

the French jurists; but the better and more reasonable opinion seems to be, that they are inconsistent with, and have been repealed by posterior laws, and particularly by a law passed on the 14th of July, 1819, which unconditionally admits all foreigners to take by inheritance in France; but, be this as it may, the article 1477 of our Code, has in our opinion no application to a case like the present. It establishes in relation to the validity of donations, *inter vivos* and *mortis causa*, a principle of reciprocity between the two nations. If American citizens can receive bequests in France, so can French subjects here. The decrees alluded to, if considered as being yet in force, would not have denied to Jean Mager the right of inheriting from his sister in France on the score of his being an American citizen, but because as a French subject, he had offended against the municipal laws of his native country, by causing himself to be naturalized without the consent of his government. Had Mager in the same way become a citizen of any other country than the United States, the consequences to him would have been the same in relation to his right of inheriting in France, and yet the widow Collard's claims to a bequest from him, could surely not have been disputed under the provision of our Code, which is now relied on. Can it be expected that we will punish Mager, or his heirs, because he thought proper to become an American citizen; that we shall give extra-territorial force and effect to municipal laws of France, denouncing penalties against French subjects, so as to visit upon one of our citizens consequences which, under an express article of the constitution of the United States, can be attached to, or made the punishment of no crime or offence, however henious? But even were the strange position here assumed on behalf of the State, well founded in relation to the widow Collard's right to receive the bequest of her brother, it would by no means follow that the succession of Mager could be claimed by the State. Being the sister, and one of the nearest legitimate heirs of the deceased, the widow Collard would be entitled to his succession by mere operation of law. Civ. Code, arts. 882, 945, 946. The State can only take when there is no one entitled to

an inheritance, or when it is not claimed by one having a right to to the same. Civ. Code, arts. 477, 911, 923.

Judgment affirmed.

CLAUDE ANTOINE CHOPPIN and others *v.* JEAN PIERRE MICHEL.

APPEAL from the District Court of West Baton Rouge, *Deblieux*, J.

S. L. Johnson, for the appellants.

G. S. Lacey and Labauve, for the defendant.

BULLARD, J. This case was before us last year, and was remanded for a new trial. 11 Rob. 233. That trial resulted in a final judgment for the defendant, and the plaintiffs appealed.

The case is now fairly before us upon its merits; and the question is, which party has the best title to the land in controversy.

The plaintiffs trace back their title to an inchoate grant, in 1767, made by the French Commandant of Pointe Coupée, in favor of Pierre Perreault. The tract petitioned for is described by the grantee to be on the point of False River, on the bank of the Mississippi on one side, of forty *arpents* front, with the depth which it may have, (*sur la profondeur qu'il pourra y porter,*) and as there is no depth, he asks for forty arpents front. At the foot of the petition the Commandant says, that he grants the land subject to the good pleasure of the Governor, on condition that the land shall be visited, and if it should appear that it has forty *arpents* in depth, that is to say, if it can be worked on without going into the water, he accords the forty *arpents*, and the rest shall remain a part of the domain.

Nothing more appears to have been done to perfect the grant to Perreault; but his claim was afterwards confirmed by act of Congress.

The defendant's title is based upon an order of survey by Governor Gayoso, dated February 14th, 1799, upon the petition of Jean Mollere, in which he asks for a grant of 800 *arpents* of Cypress swamp, (*Cypriera,*) in the District of Pointe Coupée, at

a distance of two leagues and a half from the fort or ancient redoubt down the river, bounded on the south by lands surveyed in favor of Stephen Watts. The next year, (1800,) this first decree was followed by a survey approved and certified by Trudeau, the Surveyor General of the province. The figurative plan annexed to that survey shows, that the land is bounded below by Watts, and runs back to a line dividing the point formed by a bend of the river, below the lower mouth of False River, into about equal parts, according to the usage of Spanish surveyors.

The title of Mollere has been confirmed; and the location of it by the Land Department of the United States conforms to Trudeau's survey, and that survey appears to be in conformity to the calls of the title. It is further shown, that the defendant, and those under whom he holds, have been in possession for a long time according to the location under the authority of the United States.

The title of the plaintiffs, on the other hand, is somewhat vague in its terms, and does not necessarily cover that part of the land claimed by the defendant, with which it is alleged to conflict. It is not shown to have been surveyed before the change of government, nor to have been located since under the confirmation by Congress, so as to conflict with the tract granted to Mollere. It is however contended, that the plaintiffs have acquired title by prescription; but we concur with the court below in opinion upon this point, that they have not shown that open, unequivocal, public, and uninterrupted possession, which is required to give them title by prescription.

It is questionable, whether either of the primitive titles under which the parties hold was valid. That of the plaintiffs in 1797, was by a Commandant of a post expressly subject to the approbation of the Governor, which is not shown, and without any survey or putting in possession. The order of survey in favor of Mollere by Gayoso de Lemos, was given the day after the notification to him of the royal *cedula*, depriving the Governor of authority to grant lands, and vesting it exclusively in the Intendant. Laying both the primitive titles out of view, and assuming that both confirmations took place at the same time, the location by the United States until changed must prevail. The defendant

holds in conformity to that location. Not only the title of the defendant is the most certain and explicit, but we concur in opinion with the District Court, that the defendant, holding under the confirmation, and in conformity to the location by the Surveyor General, has been in quiet and uninterrupted possession for a sufficient length of time to have acquired title by prescription.

Judgment affirmed.

JEAN PIERRE MICHEL *v.* GEORGE M. HAMILTON, Tutor of JAMES FRANKLIN BLACKMAN and others, Minors.

APPEAL by the defendant from a judgment of the District Court of West Baton Rouge, *Deblieux*, J.

G. S. Lacy, for the plaintiff.

L. Janin and *S. L. Johnson*, for the appellant.

BULLARD, J. The object of the present action was to establish the true boundary line which separates the lands held by the plaintiff under the title of Mollere, as shown in the case of *Choppin et al.* v. *Michel*, just decided, and the tract of the defendant's wards adjoining. The parties agreed that, if the court in that case should give a judgment in favor of the plaintiffs, then judgment should be rendered in this suit, locating the Courtin tract according to the plat set forth in the defendant's answer; but should the judgment be in favor of Michel, then the line was to be established as claimed by the plaintiff in this case. The judgment to be rendered in this case being thus made to depend upon that in *Choppin et al.* v. *Michel*, was accordingly in favor of the plaintiff, establishing the boundary line as claimed by him, and which conforms to the location of his land by the United States surveyors. That judgment having been affirmed by this court, it follows, that the court did not err in the present case in deciding according to the agreement of the parties.

Judgment affirmed.

GEORGE M. HAMILTON, Tutor of JAMES FRANKLIN BLACKMAN and others, Minors, *v.* JEAN PIERRE MICHEL.

Where the police regulations of a parish require that notice in writing shall be given to resident proprietors personally, or at their domicil, of all work required to be done on any levée, the land on which such work is to be done, if the property of a resident proprietor, cannot be made liable, by a summary proceeding *in rem*, for the cost of such work, though executed in pursuance of an adjudication by the overseer of roads and levées, without proof of written notice, served personally, or at the domicil of the proprietor. The certificate of the inspector of roads and levées is not conclusive proof of notice, as against the proprietor; and parol evidence is admissible to prove that no sufficient notice was given.

APPEAL from the Parish Court of West Baton Rouge, *Favrot*, J.

Elam, for the plaintiff, cited act of 8 February, 1831, § 4, Bul. & Curry's Digest, 764. *Newcomb* v. *Police Jury of East Baton Rouge*, 4 Rob. 233.

G. S. Lacey, for the appellant.

BULLARD, J. The defendant is appellant from a judgment perpetuating an injunction obtained by the heirs of Blackman, to stay proceedings on an order of seizure and sale, sued out by the defendant against their land fronting on the Mississippi, in pursuance of an adjudication by the Overseer of Roads and Levées, for making a levée on the same, according to law, and the regulations of the parish. The injunction was made perpetual because, in the opinion of the Parish Judge, the notice was not legally given, and the works were not made according to law; but Michel's claim was allowed for about $100, for labor done by his slaves on the requisition of the proprietor. As this part of the judgment is not complained of, we confine our attention to the question, whether there has been such a compliance with the law and the police regulations relative to the letting out of the making of levées to the lowest bidder, as justified the resort to a summary proceeding *in rem*.

The police regulations as shown in the record, (section 19,) require, that notice in writing shall be given of the works and repairs to be made on the road, bridges, ditches and levées, personally, or at their domicil, to resident proprietors, and by publi-

cation in the Baton Rouge Gazette to non-residents. It is shown that the plaintiff is a resident within the parish of West Baton Rouge, and no personal notice is shown.

But it was contended on the trial below, that the certificate of the inspector is conclusive as to the notice given, and was not to be contradicted by parol evidence, so long as it was not annulled by a direct action. But the court ruled otherwise, and a bill of exceptions was taken. We think the court did not err. The law does not make the certificate of the inspector, made long after the adjudication, full and conclusive evidence against the proprietor, that the notices required by law had been previously given. In this case it is shown that, although the residence of the tutor of the minor heirs was within the parish, no notice was given, other than through the Baton Rouge Gazette, published in another parish.

Judgment affirmed.

ESTEVAL BAUDOIN *v.* JOSEPH NICOLAS and others.

A party to the record is inadmissible as a witness.

An overseer being entitled to one-fourth of the crop for his services, a creditor of the owner of the plantation seized under a *fi. fa.* three-fourths of the growing crop, and became the purchaser thereof at the sheriff's sale. In an action by the overseer against the purchaser: *Held*, that the seizure did not operate as a partition between the overseer and his employer, nor restrict the right of the former to the fourth not seized; and that the purchaser, acquiring no greater right than his debtor had, is liable to the overseer for one-fourth of the price for which the three-fourths of the crop were sold.

APPEAL by R. P. Gaillard, one of the defendants, from a judgment of the District Court of Lafourche Interior, *Nicholls*, J., in favor of the plaintiff.

BULLARD, J. The plaintiff alleges, that Nicolas is indebted to him, nine hundred dollars for wages as overseer, for the year 1844, and a part of the year 1845, and that he has a privilege for that amount upon the crops of those two years. He represents, that the plantation and slaves belonging to said Nicolas, together with the crops made in several previous years, and that now growing

thereon, have been seized by the Sheriff at the suit of Toledano & Gaillard, and are about to be sold, and the proceeds paid over to said Toledano & Gaillard, unless enjoined. He therefore prays for judgment for the $900, and that the Sheriff may be ordered to retain in his hands, a sufficient amount to pay him.

Nicolas made only a nominal defence. Toledano & Gaillard, the seizing creditors, answer, that the plaintiff contracted with Nicolas for one-fourth of the crop, as a compensation for his services as overseer, and that his portion of the crop has not been included in the seizure nor sold, but still remains subject to his disposition.

The Sheriff's return shows, that he seized "three-fourths of the present crop" and three-fourths of thirty-one stacks of rice, the crop of the previous year; that the portion of the stacks of rice seized was appraised at $1975, and the growing rice at $320. The whole property seized was sold *in globo*, and Gaillard became the purchaser at something over the appraisement.

We are of opinion, that the court erred in permitting Nicolas, one of the defendants, to be sworn as a witness on the trial of the cause. It is well settled, that a party to the record is inadmissible as a witness.

The evidence shows clearly, that the plaintiff, Baudoin, was to have one-fourth of each crop of rice, for his services as overseer, and consequently he could not recover a specific sum in lieu of his fourth, so far as Toledano & Gaillard are to be affected. He had one undivided fourth of the growing crop, and of the thirty-one stacks of rice, the produce of the previous year. The creditors of Nicolas could only levy on his undivided three-fourths in the whole, because the right of Baudoin extended to every part. The Sheriff, by seizing three-fourths, could not operate a partition between the overseer and his employer. Baudoin's right to one-fourth was not defeated by such a proceeding, and his right restricted to the fourth not seized. Gaillard having purchased the three-fourths seized, acquired no greater right than Nicolas had, to wit, three undivided fourths of what was seized. For one-fourth, he is, in our opinion, accountable to Baudoin, the co-proprietor of the rice, reserving to the latter his right to one undivided fourth of the part not seized by the Sheriff. The rice

seized appears to have been bought in by Gaillard for $2295, and consequently he is to account for one-fourth, that is to say, $573 75, to the plaintiff. The judgment we think erroneous, in allowing the plaintiff the full amount of $900, against Gaillard, the appellant.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and that the plaintiff recover of R. P. Gaillard, five hundred and seventy-three dollars and seventy-five cents, with interest at five per cent from judicial demand, with costs in the District Court, those of the appeal to be borne by the plaintiff and appellee, reserving to him his right to claim one undivided fourth of any part of the crops not seized.

Beatty, for the plaintiffs.

Bonford, for the appellant.

THE MECHANICS AND TRADERS BANK OF NEW ORLEANS *v.* HENRY D. RICHARDSON and others.

The act of 22 March, 1843, ch. 66, which provides (sect. 5,) that the privilege granted to the city of Lafayette on property within its limits, for the proportion to which the owner is liable for any work done, or for taxes assessed thereon, shall only exist where an account thereof, duly certified, has been recorded in the office of the Recorder of Mortgages of the parish of Jefferson, does not apply to work done or taxes assessed before the date of that act; the right of the city to recover the cost of such work, or such taxes, must be governed by sects. 6 and 8 of the act of 12 March, 1836. The act of 1836, gives a privilege only for work done, and not for taxes; no law previous to the act of 1843 gave any privilege for the latter.

APPEAL from the District Court of the First District, *Buchanan*, J

L. Peirce, for the plaintiffs.

Michel, for the appellants, contended, that to say there was no privilege allowed to the city of Lafayette for taxes on property within its limits, would frequently deprive the corporation of the power of collecting any taxes whatever on mortgaged property. 9 Bing. Rep. 128. *Hoke* v. *Henderson*, 3 D. N. C. Rep. 17. 3 Blackstone, 435. Civ. Code, art. 3245.

MARTIN, J. The statement of facts in this case shows, that the plaintiffs caused certain property of the defendants to be sold under an execution issued upon a judgment obtained by them, in April, 1841; that the Mayor and Council of Lafayette claim to be creditors of the defendants, with a privilege on the property sold, in the following sums, to wit: for $93 10, on a judgment rendered in August, 1840, for the taxes of 1839; for $170 87, on a judgment rendered in April, 1842, for the taxes of 1840 and 1841; for $115 90, on a judgment rendered in December, 1842, for *banquettes* made during that year in front of the property sold; for $99 92, on a judgment rendered in May, 1843, for the taxes of 1842; and for $170, being the amount of two bills for the taxes of 1843, duly recorded in the books of the Recorder of Mortgages of the parish of Jefferson; making altogether the sum of $649 79, which they prayed might be paid by preference out of the proceeds of the sale of the property aforesaid. They were allowed the sum of $170, for the recorded bills of 1843, but their pretensions for the rest were rejected on the ground, that the general mortgages resulting from the inscription of their judgments, did not come within the provisions of the act of 1843, the fifth section of which gives to the city of Lafayette a special privilege for work done, or taxes assessed on property situated within its limits, but provides that this privilege shall only take effect where an account of the same, certified by the Treasurer and Comptroller of said city, shall have been recorded in the office of the Recorder of Mortgages of the parish of Jefferson. Laws of 1843, 42. The intervenors have appealed.

Their counsel contends, that that part of their claim which is rejected, being for taxes due, and work done before the act of 1843, cannot be affected by it, but comes within the provisions of the 6th and 8th sections of the act of 1836. (Laws of 1836, p. 132.) We agree to this. But as the act of 1836 gives a privilege for work done only, and none for taxes, we are of opinion, that the judgment complained of is incorrect, so far only as it disallows the sum of $115 90, due to the intervenors for *banquettes* made in 1842, in front of the property sold. The privilege accorded by the judgment relied on cannot be allowed, as there is no law authorizing it.

It is, therefore, ordered and decreed, that the judgment be reversed and annulled, and that the city of Lafayette be paid, by preference out of the proceeds in the hands of the Sheriff, the sum of $285 90, with interest at six per cent on $170 from the 29th of May, 1844, and at eight per cent on $115 90, from the 1st of June, 1842, till paid; the costs of the appeal to be borne by the plaintiffs, and those below by the intervenors.

JEAN PHILIPPE LAFON and another *v.* CHRISTOVAL GUILLAUME DE ARMAS and others.

Plaintiff's vendor sold him a lot of ground in the possession of a third person, for a certain sum payable whenever plaintiff should recover possession, and in consideration of his instituting and carrying on, at his expense, the necessary proceedings to recover the property. The vendor's title was founded on occupation by his ancestor, under a permission from a Spanish Governor. Plaintiff obtained a patent from the United States for the lot, but several years after, and before any action had been commenced by plaintiff against the party in possession, or the price had been paid, his vendor sold the lot to defendants, who recovered possession, and paid the price stipulated in the act of sale to them. The first sale was made while the Code of 1808, and the Spanish laws were yet in force. In an action by the first purchaser against the defendants to recover the lot: *Held*, that the plaintiff not having complied with the terms of the first sale, his right to the lot was but inchoate at the time of the second; that the sale to defendants having been followed by the delivery of the thing and the payment of the price, must prevail; and that the only remedy of the plaintiff is by an action *ex empto* for damages against his vendor.

Though the right to demand the thing sold, on complying with the terms of the sale, is acquired by the purchaser, as to the seller, as soon as there exists an agreement between them as to the thing and the price, the sale is not complete as to third persons, until the price has been paid, unless a definite term has been granted for the payment, and the possession delivered. Code of 1808, book 3, tit. 6, arts. 1, 4, 24, 26, 36, 82, 86.

APPEAL from the Parish Court of New Orleans, *Maurian*, J. The nature of the pleadings, and the facts necessary to understand the decision in this case, are fully and accurately recited in the opinion delivered by

SIMON, J. The object of this action is to evict and dispossess the defendants from the property which they recovered, several years ago, under the judgment of this court in the case of *De Ar-*

mas and Cucullu v. *The Mayor, Aldermen, &c. of New Orleans*, reported in 5 La. 132.

The pretensions of the plaintiffs are based upon the following allegations: That, in the year 1788, one Thomas Beltran, *alias* Bertrand, obtained from Estevan Miro, then the Spanish Governor of Louisiana, a permission to inhabit and build a house on the lot of ground which is the subject of this controversy, which permission was confirmed and renewed, in the year 1794, by the Baron de Carondelet, the successor in office of Estevan Miro; and that in virtue of the said permission, Beltran built a house on the said lot, which he and his family inhabited for a considerable number of years. That Thomas Beltran died on the 24th of April, 1803, leaving Catharine Maudez, *alias* Gonzalez, his widow, and seven children by his marriage with her, viz.; Antoine, Raphael, Rosalie, Manuel, Margarita, Gertrude, Joseph and Thomas Beltran.

That the said widow, acting for all the parties interested, procured the lot to be surveyed in 1807, and filed said survey with the permission and other documents, in the Land Office at New Orleans, claiming the confirmation of said title to the lot; that in 1812, a report was made by the Land Commissioners, stating that they could not make any decision on this claim, but that they thought the government should confirm it.

They further state, that on the 29th of October, 1819, the widow and her two sons, Manuel and Joseph Beltran, conveyed by a notarial act passed before Philippe Pedesclaux, then a notary public, all their right, title and interest, in and to the said lot, to the late Barthelemy Lafon; the said vendors being then the only persons having any claim thereto, in consequence of the deaths of Rosalie, Margarita, Gertrude, Thomas and Antoine Bertrand, previous to the date of the said act; that the three first named deceased heirs of Thomas Bertrand died intestate; but, that Antoine Bertrand left a nuncupative testament by public act, which was duly ordered to be executed, and by which he instituted his mother his sole and universal legatee. And that as a part of the consideration agreed on in the act of sale, the said Lafon was to take at his own expense, such proper measures, and prosecute such suit, if necessary, as to obtain the possession and

peaceable enjoyment of the said property, the vendors being aware that their title was imperfect.

That the said vendee accordingly exerted himself to procure a patent for the said lot; but that after all the preparatory measures for that purpose, and the assurance that the patent should be granted, the said Barthelemy Lafon died in New Orleans, on the 29th of September, 1820, leaving an olographic will, which was duly ordered to be executed, and in which he instituted his brother Pierre Lafon as his universal residuary legatee, and Jean Gravier and John Poumairat, his testamentary executors.

They further represent, that the patent was signed by the President of the United States, on the 17th of February, 1821, fixing the extent and location of the lot, the title to which became vested in the heirs of the late B. Lafon; and that said patent was soon after brought to this city by John Poumairat, who put it, together with the other title papers to the said lot, into the hands of Etienne Mazureau, Esq., an attorney and counsellor at law, and one of the defendants in this action, for the purpose of instituting a suit in the name of the estate of Lafon, against the Corporation of New Orleans, to recover possession of the property. That afterwards Pierre Lafon came to this city, and died in October, 1822, leaving a nuncupative will by public act, which was duly ordered to be executed, and by which he instituted the plaintiffs, who are his legitimate children, his only heirs. That the estate of Barthelemy Lafon was subsequently, grossly mismanaged, wasted, and fraudulently administered by the executors, against whom it became necessary to bring various law suits; in consequence of which, the affairs and claims of the estate were neglected, and the petitioners prevented from taking possession of the said lot, or bringing a suit for that purpose. That the validity of the sale to B. Lafon was never contested by Catharine Gonzalez, (who died on the 25th of March, 1826,) and her two children Manuel and Joseph Bertrand, until the latter were persuaded by the defendants, who were well acquainted with the said sale, to sell their claims to Christoval G. De Armas and Manuel S. Cucullu. That accordingly, on the 6th of May, 1830, the said Manuel and Joseph Bertrand, and other persons calling themselves the heirs of Rosalie Bertrand, pretended to sell the said lot

again to the said De Armas and Cucullu, by a notarial act which they executed, and in which it was stipulated, that the price of $12,000, should be paid by the purchasers, only after they should have obtained peaceable possession of the property. That since that sale, the said De Armas and Cucullu have taken possession of the lot, and have conveyed one-third thereof to Etienne Mazureau, Esq., in pursuance of an agreement entered into between them at the time of the original conveyance from Manuel and Joseph Beltran, in compliance with which, one-third of the lot was to belong to the said Mazureau in case of recovery, although he does not appear as a party to the said act.

They further allege, that the sale to De Armas and Cucullu, and the sale from them to Mazureau, were executed in bad faith on the part of all the parties therein concerned, they having a perfect knowledge of the sale to B. Lafon. That this knowledge was acquired particularly by the said De Armas and Mazureau, who were attorneys and counsellors at law; that the latter was appointed by the Probate Court of New Orleans, the attorney to represent the absent heirs of the late B. Lafon, and acted as such; and that C. G. De Armas acted in various suits as the attorney at law of one of the petitioners, (Jeanne Victoire Lafon,) having been employed for that purpose by the late Christoval G. De Armas, who had been substituted to the late Antoine Sedella, to whom Jeanne Victoire Lafon had executed a full power of attorney on the 3d of March, 1823, for the recovery of her share in the said estate, which power of attorney and substitutions were not revoked before the death of her attorney in fact. That the claim of the estate to the said lot was frequently mentioned in the proceedings of the estate, and that in the suits which the petitioners and their father had instituted against the testamentary executors, the said Etienne Mazureau gave his testimony on two different occasions, on circumstances connected with the claim relative to the lot. They pray that the three defendants be ordered to answer certain interrogatories; that the petitioners be declared to be the true and lawful owners of the said lot; that a writ of possession may issue accordingly; and that said defendants be condemned to pay $200 per month, from the 6th of May, 1830, for rent and profits, &c.

The defendants answered separately: C. G. De Armas first pleaded the general issue, and set up the sale of the 6th of May, 1830, by which he and his co-defendant Manuel S. Cucullu purchased jointly of Manuel Bertrand, since deceased, but represented by his widow and heirs, of Joseph Bertrand, yet living and residing in New Orleans, and of the heirs of Rosalie Bertrand, deceased wife of Joseph Taquino, Sen., the lot in controversy, which sale, he says, was afterwards ratified by all the parties. He further avers that, on the day of said sale, Manuel, Joseph and the three heirs of Rosalie Bertrand, were the only and lawful owners of said lot, and that they have never been divested of the same. That besides the sum of $12,000 which was promised to be paid by the purchasers to the vendors, as being the price of the property sold, the respondent and his co-purchaser also promised to sue for and recover the possession of said lot, and for that purpose to take all necessary measures and make the necessary expenses, all which was done at their costs, to the amount of $20,000; and that since the recovery of the lot, he and his co-purchaser have caused brick buildings to be raised thereon, to the amount of $25,000. He further says, that one of the plaintiffs is indebted to him in the sum of $2000, for professional services rendered to her from 1822 to 1827. He prays that his vendors be called in warranty; and, should the plaintiffs succeed in establishing their claim to the property in dispute, that said vendors be condemned to reimburse him his share of the sum of $45,000, expended for the recovery of the lot and its improvements; and that Jeanne V. Lafon be also condemned to pay him $2000 for services rendered, &c.

Manuel Simon Cucullu filed a similar answer, calling his vendors in warranty, and praying for the same judgment, (except what relates to his co-defendant's claim for $2000,) with general relief.

And Etienne Mazureau joined issue by denying all the facts, and all the allegations of bad faith contained in the plaintiffs' petition, putting said plaintiffs to the strict proof thereof, and denying specially that the petitioners have any right or legal pretension or claim to the property sued for.

The defendants' vendors also answered separately: Joseph

Bertrand pleaded the general issue, and averred, that a legal title to the premises had never been made to B. Lafon by the respondent, his mother, nor by any other person by the act of sale referred to in plaintiffs' petition; that he, respondent, was then a minor; that his said mother was legally married to one Domingo Gonzalez, then living; and that in the pretended sale, his said mother was not legally authorized, &c.

Joaquin Gomez, and his wife, as natural tutrix of the minor children of Manuel Bertrand, deceased, denied the plaintiffs' allegations going to show that they derive any title to the property in contest from the late Manuel Bertrand. They further allege, that the sale to Lafon is invalid and void, as it never was recorded as the law requires; that it is also void, because Lafon has never complied with the stipulations therein contained; and that Catharine Gonzalez, their grandmother, was not legally authorized to execute the act. They recognize the sale of Manuel Bertrand to the defendants for his undivided third part of the property in dispute, for the sum of $4000, which is yet unpaid; and pray that the plaintiffs' demand be dismissed; and that the defendants De Armas and Cucullu, be condemned to pay the price by them due, &c.

In the mean time, a supplemental petition was filed by the plaintiffs, for the purpose of increasing their demand for rents and profits to $600 per month, instead of $200, as originally prayed for; and of pointing out the manner in which the improvements should be paid for, and the property divided, in case they were not entitled to recover the whole. This supplemental petition was answered by the three defendants, who pleaded the general issue.

Another supplemental petition was filed by the plaintiffs, for the purpose again of increasing their demand for rents and profits to $1200 per month, instead of $600 previously prayed for, making four hundred dollars per month to be paid by each defendant from a certain period; and they accordingly propounded interrogatories to the defendants, in order to ascertain from them the amount of any lease which they may have made of the property, &c., and from the defendant Cucullu, whether he ever sold his

portion of the same, to whom, and by what act, and for what price, &c.

This petition was answered by the defendant Cucullu, who pleaded the general issue, and who, under oath, stated, that he had leased his portion of the property after the buildings were finished, for the term of five years, by contract with one Lafarge, &c.; that he sold his said portion to the house of Cucullu, Lapeyre & Co., who sold it subsequently to M^dme^ Rosalie Deslonde, wife of Barth. Jourdan; and he gives the dates of the acts, &c.

In an answer subsequently filed by several of the defendants' warrantors, the latter, after pleading certain exceptions to the plaintiffs' original and supplemental petitions, further say, that the pretended sale to B. Lafon is null and void, because Catharine Gonzalez, being then a married woman, was not legally authorized to sign the act; because Joseph Bertrand, one of the respondents, was a minor, and because his sister Rosalie Bertrand was then deceased, and represented by her children and heirs, all minors. They further aver, that the lot of ground sued for was the private property of the late Thomas Bertrand, and made no part of the community which existed between him and his widow, Catharine Gonzalez; that if she inherited afterwards any portion of the lot, she was divested of her title to the same by her second marriage, whereby the naked property returned *ipso facto* to the children of the first marriage; and that the sale to Lafon is also null, because he never complied with the conditions of the sale, failed to pay the price, which was less than one-half the value of the lot, and never had possession of it.

Manuel Bertrand, one of the children and heirs of Manuel Bertrand, deceased, also filed another answer, in which he says, that he is ready to defend his father's vendees against the plaintiffs, and pleads in substance the same matters which were pleaded by his co-warrantors, &c.

This detailed exposition of the pleadings, necessary for a correct and proper understanding of the real merits of the controversy, and of the true position in which the parties stand before us, presents mainly a mere question of title between two purchasers of the same property, from the same vendors, at different periods.

On the one hand, the title of the plaintiffs, originating from a sale passed to their ancestors by persons who pretended to be the owners of the property in dispute, is attacked by the defendants and their warrantors, as being insufficient to transfer the ownership of the thing sold, and as amounting only to an inchoate title, which did not prevent the vendors from selling it again to another. On the other hand, the sale to the defendants is contested as being an invalid one, proceeding from persons who were divested of their title to the knowledge of the vendees, and who therefore could not make an effectual, or valid transfer of rights which they did not possess, and which had been previously vested in other persons.

The Judge, *a quo*, thought that the defendants' title must prevail. He rendered judgment accordingly, and after a vain attempt to obtain a new trial, the plaintiffs have appealed.

L. Janin, for the appellants. We claim the lot because we have a notarial sale, whereby it became our property. Code of 1808, p. 346, art. 4. Civ. Code, 2431. French Code, 1583. We attack the sale to the defendants, because it was the sale of the property of another, and therefore null. Code of 1808, 348, art. 20. Civ. Code, 2427. French Code, 1599.

These articles are literally the same in the three Codes.

The defendants assert, that the property never was delivered to us, an assertion which we shall experience no difficulty in refuting.

Starting with this assumption, they contend, that a sale without delivery and without the payment of the price is not perfect, and does not transfer the property; that, if the vendor sells the property a second time, the second purchase, accompanied by delivery, will prevail over the first, not followed by delivery; that if the vendor refuses to deliver, the purchaser cannot compel him to do so, but can only recover damages against him; that having no *jus in re*, but only *ad rem*, not being the owner, he cannot institute the action of revendication, but only the action *ex empto*, which is an action of damages.

Such, it is admitted, was the Roman, Spanish and old French law.

But, we shall show, that even by those systems of law, the property was transferred without the payment of the price, if time was given; and the second purchaser was not protected against the first, if he was informed of the former sale, before he bought himself and took possession. And lastly, we shall put it beyond doubt, that the French Code, and after it, our Code of 1808,

wrought a radical change in the law of sale, since when, neither payment of the price, nor delivery, has been necessary to transfer the property.

Nowhere is the old law explained with more clearness than in Pothier's Treatise on the Contract of Sale, from No. 319 to No. 324. He goes even further than the counsel for the defendants. So little was the property transferred without delivery, that until delivery took place, the creditors of the vendor might seize the property in payment of their judgments. Pothier, No. 321.

But Pothier, No. 320, also adds, that it is only from a second purchaser in good faith, *inscius prioris venditionis*, that the property cannot be recovered back. If he knew of the first sale, the first purchaser had against him a revocatory action. Thus Gomez, Variae Resolutiones, Vol. 2, Cap. II, § 20, says:

"*Item quæro, si aliqua res vendatur duobus, vel pluribus diversis temporibus, quis eorum præferatur? Dico quod ille præfertur cui prius res fuerit tradita.*" And further on he limits this: "*Secundo principaliter limita et intellige, ut procedat quando secunda venditio alteri facta fuit celebrata bona fide, secus —— —— poterit primus emptor* rem *et* traditionem *revocare actione in factum revocatoria.*"

Thus also Lopez, in a note to the law quoted by the defendants (Part. 5, tit. 5, L. 1) says: "*Sed limitari potest, quod propter scientiam emptoris de prima emptione, competat primo emptori actio revocatoria.*"

In proof that the property is not transferred without the payment of the price, the defendants quote Part. 3, tit. 28, L. 46, in which occurs the following passage:

"*Empero, si el que ouiesse vendido su cosa a otri, le apoderasse della; si el comprador non ouiesse pagado el precio, o dado fiador, o peños, o tomado* plazo *para pagar; por tal apoderamiento como este non passaria el señorio de la cosa, fasta que el precio se pagasse.*"

To which we beg leave to add the concluding part of the same law:

"*Mas si fiador, o peños ouiesse dado, o tomado plazo para pagar, o si el vendedor se fiasse en el comprador del precio; estonce passaria el señorio de la cosa a el porel apoderamiento, maguer el precio non ouiesse pagado. Empero tenudo seria de lo pagar.*"

Thus, if the vendor granted time, or the purchaser gave security, the property passed to the purchaser, although he had not paid the price.

So says also Pothier, Vente, 150, No. 322:

"*Il est particulier à la tradition, qui se fait en exécution du contrat de vente, qu'elle ne transfère la propriété à l'acheteur*

que lorsque le vendeur a été payé ou satisfait du prix. Instit. *tit. de rev. divis,* § 41.

"*La raison est que le vendeur, qui vend au comptant, est censé n'avoir volonté de transférer la propriété que sous cette condition. Mais lorsque le vendeur a bien voulu faire crédit du prix à l'acheteur, la tradition, qui lui est faite de la chose, lui en transfère la propriété avant qu'il en ait payé la prix. C'est pourquoi après que Justinien a dit:* Venditæ et traditæ res non aliter emptori acquiruntur quam si is venditori pretium solverit, vel ei alio modo satisfecerit, etc., *il ajoute:* Sed si is qui vendiderit, fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri. Dict. § 41."

The defendants, in transcribing the Spanish law, add the word *cierto* after the word "*plazo.*" This is not to be found in our edition (Madrid, 1789, with Greg. Lopez' notes,) though we have seen it in another. But though several times repeated, it is quite immaterial. *Id certum est, quod certum reddi potest.* Lafon, in payment of the lot, was—First to perfect the title, and that he did successfully. Second, to institute suit if necessary. The court is now informed, that for this also measures were taken, and why they proved abortive. Third, to pay $2000, when he should be in possession. This part of the agreement we are not bound to fulfil, because the defendants themselves prevent our taking possession. A term may be designated not only by a day of the the calendar, but also by an event which is to happen. And when the event is to be the result of the exertions and measures of the purchaser, it will in law be considered as lapsed, whenever, in the exercise of due diligence, the purchaser might have brought it about. "Equity," says Story, (1 Eq. § 61,) "looks upon that as done which ought to be done." This is precisely the same term, "*plazo,*" which was given to the defendants in their purchase from the Bertrands; they were to pay only after recovery.

The position of the defendants leads to this absurdity, that until the plaintiffs had paid the $2000, and although they had brought suit against the corporation, and obtained a judgment of the Supreme Court, they had no title; that even after such a judgment they might have made a second and valid sale to another person. How could the plaintiffs have maintained a petitory action, if their sale had not immediately vested a title in them? Was it not executed for this very purpose?

The portion of the law of the Partidas, applicable to this state of facts is rather that which says the property is transferred, even without the payment of the price, if the vendor trusted the purchaser for the price, "*o si el vendedor se fiasse en el comprador del precio.*"

But the plaintiffs had a sufficient delivery of the lot. Art. 29, p. 350 of the old Code, explains very particularly how the delivery of immoveables is made. This article, which is entirely conformable to the Roman and Spanish law, is in the following words:

"Tradition or delivery of immoveables is made by the seller, when he leaves to the purchaser the free possession of the same, by dispossessing himself, either by delivery of the titles, if any, or of the keys, if it is a place shut up, such as a house, a park, a garden, and the like; or by putting the buyer on the premises; or only by letting him have a view of the same, or by consenting that he become a possessor; or by an acknowledgment on the part of the seller, that if he still retains possession, it is only in a precarious way, that is to say, as a person who possesses the property of another person, on condition of giving up said property at the request of the owner."

It will be recollected that since 1812, the Bertrands had ceased to occupy the lot, (5 La. 186,) and that until 1822, the corporation did no act whatever evincing a design to prevent Lafon's possession. He never enclosed or built on it, but this was not necessary for the purpose of delivery. In the words of the article, he had the view of the property; the vendors consented that he should take possession; no one else was in possession; they had delivered their titles to him. Plaintiffs still have, and gave in evidence, the original permission of settlement, signed by Governor Miro; and another document, the survey of 1807, was delivered to Mazureau by Poumairat. This is the symbolic delivery, not existing, it is true, in our present law, nor in France since the Civil Code, but well known to the Roman and Spanish and former French law, and expressly sanctioned by our first Code. It produces, both for the purposes of delivery and prescription, all the effects of a corporeal apprehension and occupation. Pothier, Vente, No. 322. 2 Gomez, Variæ Resolutiones, No. 20, p. 18. The French Code, and after it, our Code of 1808, introduced an important change in the law.

Art. 4, p. 346, of the old Code, art. 2431 of the present Code, and art. 1583 of the French Code, say in the same words, that "the sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and the price thereof, although that object has not yet been delivered, nor the payment made."

The seller is bound to deliver the property, (Old Code, p. 348, art. 24; Civ. Code, 2450, French Code, 1603,) unless the sale has been made for cash, (Ibid, p. 350, art. 36, Civ. Code, 2403, French Code, 1612,) in which case alone he can demand previ-

ous payment. And art. 38, p. 266 of the Old Code, 1903 of the Civ. Code, and 1138 of the French Code say:

"The obligation to deliver the thing is perfect, through the mere consent of the contracting parties: it renders the creditor the owner, and makes the thing be at his risk, from the time when it was to be delivered, although the delivery may not have taken place, unless the debtor delayed to deliver it, in which case the thing remains at the risk of the latter."

What can be in more direct opposition with these articles than the Roman, Spanish and old French laws, which say throughout, that the sale is not perfect and the purchaser is not the owner, without delivery and payment of the price? Any attempt to comment on so plain a proposition, could only obscure it.

But say the defendants, the sale is perfect by consent between the parties only; [Old Code, 346, art. 4;] as to third persons, delivery is required. This is a gratuitous assumption—the Code says expressly what is necessary to give effect to the sale, as against third persons. It is not delivery but registry. Code of 1808, p. 344, art. 3. It is for the protection of third persons, that registry laws have been enacted in modern times, in most civilized countries; they have superseded, and most effectually, the formerly existing necessity of delivery. Sales of moveables, which are not subject to registry, still require to be followed by delivery. Code of 1808, p. 266, art. 41. Civ. Code, 2453.

All the commentators on the French Code represent the former law as we have stated it, and explain and admit, that the Code in the articles we have quoted, and which have been copied into both our Codes, have entirely departed from it. 1 Troplong, Vente, p. 54, § 39, Duvergier, Vente, Nos. 24, 37, 39, 254. Rogron à l'art. 1583. 4 Toullier, p. 57, No. 59; p. 59, No. 61. 7 Id. p. 88, No. 37. See particularly Lahaye's *Code Civil Annoté*, where under art. 1583, numerous authorities are collected.

We shall not trouble the court, with references to its own decisions. The points here raised have certainly the merit of novelty, but the reason is, that they are too well understood ever to have been questioned. The only cases quoted by the defendants are, *Garritson* v. *His Creditors*, 7 La. 51, and *Monday* v. *Wilson*, 4 La. 338; the one a case of a steamboat, a moveable, the other of slaves, for both of which the law yet requires an actual delivery. Code of 1808, p. 351, art. 28; p. 266, art. 41. Civ. Code, 2454, 1916.

It is urged that the sale is null in consequence of the non-performance of the conditions on which it was made. But the plaintiffs should have been put *in mora*, before claiming the rescission of the sale on account of the non-payment of the price. This ques-

tion was discussed in the case of *Ferrari, Administratrix*, v. *Rice et al.* 11 La. 101. There also, the same individual had sold the land twice. The first purchaser sued the second in possession, who retorted that the price had not been paid, and claimed the rescission of the first sale. The plaintiff's counsel maintained, that "a suit for the rescission of a sale must always be preceded by a suit for the price, and can be resorted to, only after the latter has proved ineffectual. Code of 1808, p. 360, arts. 87, 88. Civ. Code, art. 2541. Or, at least, that a judicial demand must be made for the price, and subsidiarily only for the rescission, if the price is not paid within the time fixed by the judgment. 10 Toullier, 260. 3 Delvincourt, 78 and notes. The purchaser must be put in default; Civil Code, arts. 2041, 2042, 1006; and this can be done by the vendor, only if ready and willing to perform his part of the contract, and when he offers to do so. But if he at the same time withholds the property, under color of a title adverse to that which he had transferred to the vendee, and threatens the vendee with rescission, his demand will not be listened to. 2 Troplong, Vente, 76. A rescission cannot be ordered when the vendee is disturbed or dispossessed, as in this case, by the act of the vendor or his heirs."

And the court said: "The rescission of the sale was properly overruled, on the ground of the absence of any evidence of the plaintiff having been put *in mora*, a circumstance which must essentially precede a demand for the rescission of a sale. It has been contended that the party was put *in mora*, by the plea claiming the rescission of the sale, and the absence of any tender, on her part, of the balance of the price due. To this it has been correctly objected, that those who have succeeded to the rights of Ferrari's vendor, have manifested an unwillingness to receive this balance, and consent to a rescission, if they could succeed in repelling the plaintiff's claim on the score of simulation, or any other."

And the same authorities prove, that the law is the same, whether the rescission of the sale be demanded for the non-payment of the price, or for non-compliance with any other conditions to which the purchaser has subjected himself. They are indeed a part of the price.

While it is admitted, that if the heirs of Rosalie Bertrand still retained their interest, the plaintiffs could not recover against them, the plaintiffs contend, that Mazureau and De Armas, who now own two-thirds of that interest, have become their trustees *in invitum*, and must be deemed to have purchased for their account. See Story's Equity Jurisp. §§ 218, 219, 311, 312, 313, 392, 533, 1195, 1254, 1261, 1262, 1265. *M'Michael* v. *Davidson*, 7 Rob. 53.

Mazureau, for the defendants. This case must be decided under the provisions of the Code of 1808, which was in force at the time of the sale to B. Lafon. This Code declares, p. 344, art. 1, that the contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself." Enumerating the obligations created by the contract of sale, it declares, p. 348 art, 24, that "the seller is bound to two principal obligations, that of delivering and warranting the thing sold;" adding, p. 350, art. 36, that "the seller is not bound to make a delivery of the thing if the buyer does not pay the price, and the seller has not granted him any term for the payment." The same Code declares, p. 360, art. 82, that "the principal obligation of the buyer is to pay the price;" and art. 86, that "if the buyer does not pay the price the seller may sue for the dissolution of the sale." This definition of the contract of sale is taken *verbatim* from Domat, Lois Civiles, Vente, book 1, tit. 2, sect. 1, art. 1. It is evident from this definition that until the purchaser has paid the price he cannot have the thing sold. From the moment that the parties have agreed as to the thing and the price, the purchaser may have *a right to have* the thing, but it is not his until the price has been paid.

The ownership or property (*propriété*) of a thing is distinct from the thing itself. Code of 1808, p. 103, art. 1. Civ. Code of 1825, arts. 480, 482, 483, 484. Art. 4, p. 346 of the Code of 1808, identical with art. 2431 of the present Code, declares, "that the sale is considered to be perfect between the parties, and the property (*propriété*,) is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object, and for the price thereof, although said object has not yet been delivered, nor the payment made." This article does not declare that the *thing*, but that the *property or ownership* alone, is of right acquired as soon as there exists an agreement; and this property or ownership is only acquired, *de droit*, by the effect of the agreement; it is acquired, *de fait*, only by delivery and payment of the price. "The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer." Code of 1808, p. 350, art. 26. Code of 1825, art. 2452. It is evident then, that mere agreement as to the thing and the price, does not transfer the thing, though it suffices to transfer the property or ownership. The words *power*, (*puissance*,) and *possession*, used in the article just quoted, express very different things. One may have the *possession* of a thing, without having the *power* to dispose of it at his will. The delivery made in pursuance of a sale puts the thing both in the power and possession of

the purchaser. This delivery is made because the price has been paid or surety given for its payment; then only is the property in the thing acquired, *de droit* and *de fait*, and the title perfect. So long as the price has not been paid, and the *thing* not delivered into the power and possession of the purchaser, the latter has but an imperfect ownership or property: for, 1. if the sale was not on a credit, the purchaser cannot cause the thing to be delivered to him but on paying the price; 2. if on a credit, and the price is not paid at the time fixed, the vendor may rescind the sale; 3, the vendor retains a priviiege to secure the price which follows the thing, into whosesoever hands it may pass. Code of 1808, p. 351, art. 36; p. 361, art. 86; p. 471, art. 75. Code of 1825, arts. 2463, 2539, 3216. "*La vente*," says Domat, "*renferme la condition que l'acheteur ne sera le maitre qu'en payant le prix.*" Lois Civiles, book 3, tit. 1, § 5, No. 4. The principle established by the Code of 1808, is founded on the Roman law. "*Si pecuniam dem, ut rem accipiam, venditio est.*" Law 5, § 1, ff. De præscrip. verbis. "*Quod vendidit, non aliter sit accipientis, quam si aut pretium nobis solutum sit, aut satis eo nomine factum.*" Law 19, ff. De contrahenda emptione.

"*Le premier engagement de l'acheteur*," says Domat, "*est de payer le prix —— car l'acheteur n'est rendu le maitre de la chose vendue, que par ce payement, ou autre sureté qui en tienne lieu.*' Contr. de Vente, book 1, title 2, sect. 3, No. 1. Now there was neither price paid nor security given by Lafon, nor any proceedings commenced by him to obtain possession of the land; and when, in 1830, eleven years after his purchase, the land was sold to De Armas and Cucullu, it was not Lafon's, nor his heirs.

Art. 4, p. 346 of the Code of 1808, is not to be understood literally. If interpreted according to its letter, the purchaser would be entitled, immediately after the agreement as to the object and price, to an action to cause the *thing* to be delivered to him, which is not the case. The provisions of art. 242, p. 311, and art. 2 and 3, p. 344 of that Code, show that art. 4, p. 346, cannot be understood literally. But even if this article were to be construed in the sense contended for by the plaintiffs, it could not be applied to third persons. The Code of 1808 declares a contract of sale to be a *convention*, and that such conventions, p. 270, art. 65, have no effect but between the contracting parties. The sale to Lafon can have no effect, consequently, against De Armas and Cucullu, who were third persons.

It is contended, that by art. 20, p. 348 of the Code of 1808, (Code of 1825, art. 2472,) "the sale of a thing belonging to another person is null." But "*Quod nullum est non producit effectum*," and "*Quod ab initio vitiosum est non potest tractu*

temporis convalescere." Now both the old Code, p. 486, art. 67, and the new Code, art. 3442, declare, that one "who becomes possessed of an immoveable estate fairly and honestly, and by virtue of just title, may prescribe for the same, after the expiration of ten years if the true proprietor resides in the territory, and after twenty years in case said proprietor resides abroad;" and (Code of 1808, p. 488, art. 85, Code of 1825, art. 3449,) that "a *just title* is one by virtue of which property may be transferred, such as a sale, a donation, and the like," &c; and the Code of 1825, to dissipate all doubt, declares, art. 3450, that "by the term *just title*, in cases of prescription, we do not understand that which the possessor may have derived from the real owner, for then no prescription would be necessary, but a title which the possessor may have received from any person whom he honestly believed to be the real owner, provided the title were such as to transfer the property;" and art. 3451, that "in this case by the phrase *transfer the property*, we understand not such a title as shall have really transferred the property, but a title which by its nature would have been sufficient to transfer the property, provided it had been derived from the real owner, such as a sale, exchange, legacy, or donation." Here, then, is a case in which the sale of a thing belonging to another does not produce an effect; in which a sale, vicious in its origin, acquires by time the same force, against the true proprietor himself, as if the sale had been made by him personally. The sale of a thing belonging to another is only null, where the true proprietor *revendicates* it before the expiration of the term necessary to prescribe.

The sale of a thing belonging to another is absolutely null only in the following case. Peter cannot sell to Paul, nor Paul purchase from Peter, a thing which both know to belong to James. Such a sale is null, and produces no effect. Paul cannot demand the delivery of the thing, nor Peter the price. Paul has a title translative of property, but not being in good faith, he cannot avail himself of the prescription of ten or twenty years. He may prescribe by thirty years; but this is not the prescription of a purchaser; his title being of no importance in acquiring by this prescription, and his bad faith being no obstacle to it. This is the prescription of the usurper—of the robber. If the land be claimed, it suffices for him to say: *possideo quia possideo*—my possession is my title. Such a sale of a thing belonging to another is null by the Spanish law. 5 Partida, tit. 5, laws 19 and 54. By that law, as by our Codes, if the purchaser was ignorant of the fact that the thing belonged to another, he had recourse against his vendor in damages.

To sustain this action, the plaintiffs in this case must show,

that the defendants knew that the thing purchased by them belonged to the plaintiffs, and not to those from whom they bought.

But even supposing the sale to Lafon, who never was in possession, to have been perfect, it could not affect the defendants, who were at the institution of this suit, and still are, in possession of the thing sold. "*L'action ex empto*," says Pothier, Vente, No. 62, "*est une action simplement personelle, qui ne peut avoir lieu* que contre le vendeur et ses héritiers; *elle ne peut avoir lieu contre un tiers détenteur à qui celui qui m'a vendu la chose l'aurait depuis vendue et livrée contre la foi du contrat qu'il aurait fait auparavant avec moi.*" See also Domat, Lois Civiles, Vente, book 1, title 2, sect. 2, art. 13. Denizart, Collection des Decisions, *verbo*, Vente, vol. 4, p. 600, says: "*En matière d'immeubles, it faut que la vente soit suivie de tradition réelle de possession; parce que, lors qu' une même chose a été vendue successivement à deux personnes différentes, on n'a pas recours à la date des contrats pour juger lequel des deux acheteurs doit etre préféré; l'antériorité n'est d'aucune considération. La loi a imprimé des caractères à la vente qui déterminent sa réalité, telles sont la tradition de la part du vendeur et la possession de l'acheteur. Tout contrat de vente qui n'est pas suivie de la délivrance est moins une vente effective, rélativement au second acheteur, qu 'un simple engagement de la part des contractans d'exécuter réciproquement ce qu 'ils promettent. Ainsi le second acquéreur qui a la tradition et la possession réelle en sa faveur est préféré au premier qui n'a ni tradition ni possession.*"

These are the true principles of the contract of sale. Such is the law of Spain. 5 Partida, tit. 5, law 50. Such also is the law of France since the Code Napoleon. Bousquet, Explication du Code Civil, ed. 1806, vol. 4, p. 50, No. 4. Bernardi, Commentary on Pothier, note to No. 321 of the Treatise on the Contract of Sale, says: "*L'on vient de voir que Pothier rappelle la maxime du droit Romain que ce n'est pas par une simple convention, mais par la tradition réelle que le domaine, ou la propriété de la chose vendue est transférée. Cette doctrine n'avait lieu, dans notre droit Français qu' à l'égard du tiers. La vente, quoique non suivie de tradition, était parfaite entre le vendeur et l'acheteur, mais non à l'égard du tiers. Le Code Civil a adopté cette maxime, art.* 1583. ——— *L'article* 1583," he continues, "*dit que la vente est parfaite, par le seul consentement, entre le vendeur et l'acheteur. Il faut donc quelque chose de plus à l'égard du tiers.*" Art. 1583 of the Code Napoleon is adopted *verbatim* in the Code of 1808, which has, consequently, also adopted the doctrine of Pothier, that it is the *tradition réelle*, and not the simple

consent of the parties, which renders the sale perfect. Thus it is provided by the present Civil Code, art. 2456, that, "in all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated," &c; and art. 3399, that "to be able to acquire possession of a property, two distinct things are requisite: 1. the intention of possessing as owner; 2. the corporeal possession of the thing." Art. 2456 is founded on the Spanish law. Curia Felipica, book 2, ch. 13, *verbo*, Revocatoria, No. 14.

It is then the *tradition réelle*, the corporeal possession of the thing sold, which perfects the sale. This is so true, that the Code of 1808, p. 478, art. 23, declares, that "the natural connection between the possession and the property makes the law presume that they are joined in the person of the possessor; and until it be proved that the possessor is not the right owner, the law will have him, by the bare effect of his possession, to be considered as such." Common sense would tell us, that it is only the real delivery of the thing which can notify third persons of the sale. The sale to Lafon being imperfect, gave the purchaser no *jus in rem*, but only an action *ex empto* against his vendor for damages, unless the latter preferred to deliver the thing on receiving the price.

At the time of the sale of Lafon, the law 46, tit. 28 of the third Partida, was in force in this State. That law is in these words: "Apoderan vnos omes a otros en sus cosas, vendiendogelas o dandogelas en dote, o en otra manera, o cambiandolas, o por alguna otra derecha razon. E porende dezimos, que por tal apoderamiento como este, que faga vn ome a otro de su cosa, o que lo faga otro alguno por su mandado, que passa el señorio de la cosa, a quel a quien apoderasse della. Empero, si el que ouiesse vendido su cosa a otri, le apoderasse della; si el comprador non ouiesse pagado el precio, o dado fiador, o peños, o tomado *plazo* cierto para pagar; por tal apoderamiento como este non passaria el señorio de la cosa, fasta que el precio se pagasse. Mas si fiador, o peños ouiesse dado, o tomado plazo para pagar, o si el vendedor se fiasse en el comprador del precio; estonce passaria el señorio de la cosa a el por el apoderamiento, maguer el precio non ouiesse pagado. Empero tenudo seria de lo pagar.

Thus, in general, the dominion, (*el señorio,*) passes by delivery, but in matters of sale, the simple delivery does not transfer the dominion, (*el señorio.*) The purchaser does not become master of the thing until the price is paid, unless he have given security therefor, or unless a fixed certain term or delay, (*plazo cierto,*) has been granted to him to make such payment. Thus,

though Lafon had even obtained possession, (*el apoderamiento,*) of the thing, he would not have become the owner or master of it; and could only have become so by paying the price, or giving security, or by proving that a fixed term or delay had been granted to him to make payment.

The doctrine of the Partida is in perfect accordance with the principles laid down by Domat. Vente, book 1, sec. 1, arts. 1, 2; sec. 2, arts. 1, 10 and note thereto. The law 46, tit. 28, of the 3d Partida is not inconsistent with the 6th law, tit. 5 of the 5th Partida, any more than the 2d art. of the 1st sect. of the 1st book of the contract of sale of Domat, is with the 10th article of the same section and book.

Art. 38, p. 266, of the Code of 1808, which declares, that "the obligation to deliver the thing is perfect, through the mere consent of the contracting parties;" and that, "it renders the creditor the owner, and makes the thing be at his risk, from the time when it was to be delivered, although the delivery may not have taken place, unless the debtor delay to deliver it, in which case the thing remains at the risk of the latter," applies only to moveables. But supposing this article applicable to sales of immoveables, it could have no effect on the present case. This rule, which places the thing at the risk of the purchaser, is not founded on the idea that the sale is perfect by the consent of the parties. The reason of the rule is clearly explained by Domat, in a note to art. 2, sec. 7, tit. 2, of his Treatise on Sale. He says: "*Quoique l'acheteur ne soit rendu proprement le maître qu'après la délivrance, il ne laisse pas de souffrir ces pertes qui arrivent entre la vente et la délivrance, car, le contrat étant accompli, il a cet effet que l'acheteur peut contraindre le vendeur à la délivrance, et que le vendeur ne possède la chose vendue qu'avec la nécessité de la remettre à l'acheteur.* It is then because the purchaser has neglected to obtain delivery after the contract has been perfected, that the loss is at his risk. Such was the Roman law; and the same principle was incorporated into that of Spain, (5 Partida, tit. 5, laws 23, 27,) and was the law under which the sale to Lafon was made.

When the contract is perfect by the signature of the act, the vendor is under an obligation to deliver the thing, on the demand of the purchaser, accompanied by an offer of the price, and if, after such a demand, he delays to do so, the thing is at his risk; if, on the other hand, the debtor is ready to deliver the thing sold, and the purchaser delays to receive it, the thing is at the risk of the latter. Nothing can be more just than this principle; nor is it at all inconsistent with the doctrine, that payment and delivery alone render the purchaser the absolute master of the thing. The thing is not at the risk of the purchaser, after the agreement, but

before the delivery and payment of the price, because he is its absolute owner; but because he has neglected to do what he was bound to have done. It is, in this sense, that the maxim, *res perit domino*, is to be understood. "*Is qui actionem habet, ipsam rem habere videtur.*"

It has been contended, that the registry of the sale supplies the want of delivery. The acts of 1810 and 1813, providing for the registry of sales, &c., were passed to protect third persons against the effect of art. 75, p. 470, of the Code of 1808, which grants a privilege to the vendor, on the estate or slave sold by him, for the payment of the price, whether a mortgage has been received or not. There is nothing in the registry laws which show, that the registry of the sale was designed to supply the place of the actual delivery of the thing sold. They provide, on the contrary, that though there has been an actual delivery, the sale must still be registered, to have effect against third persons. The same remarks apply to the registry act of 1827, which was besides, long posterior to the sale to Lafon.

Art. 3, p. 344, of the Code of 1808, (Code of 1825, art. 2417,) prescribing the registry of acts of sale *sous seing privé* of immoveables in the office of a notary, was designed only to give such acts a certain date. No one ever dreamt that such registry was intended to supply the want of an actual delivery of the thing sold.

Simon, J. The origin of the title of Thomas Bertrand to the lot of ground in question, is fully described in the report of the case of *De Armas and Cucullu* v. *The Mayor, Aldermen and Inhabitants of New Orleans*, 5 La. 132. He died in 1803, leaving a widow and seven children. Some of those children died. His widow was married, in 1804, to Domingo Gonzalez. She was separated in property from him in 1817, and after divers attempts to obtain a confirmation of their title to the lot from the government of the United States, the widow and two of her children, named Manuel and Joseph Bertrand, sold said lot to Barthelemy Lafon, by a notarial act. This act was executed on the 29th of October, 1819, and purports to be made by Catharine Gonzalez, stating herself to be the wife by a second marriage, and separated in property, of Domingo Gonzalez, and authorized, on account of his absence, to pass all acts, by a judgment of the Parish Court of New Orleans, stipulating as widow in community of Thomas Bertrand, her first husband; and by Manuel and Joseph Bertrand, as heirs, each for one-half of their father's estate.

They sell all the rights and pretensions whatever, which they have or may have to a lot of ground therein described, the purchaser declaring himself well acquainted with it, and the titles whereof are presently delivered to the purchaser, for his use and benefit, "*pour lui servir et valoir ce que de droit:* 1°. *Moyennant la somme de deux mille piastres que l'acquéreur s'oblige de payer aux vendeurs aussitôt qu'il sera en paisible possession et jouissance du dit emplacement, et non pas avant.* 2°. *Et en outre à la charge par l'acquéreur qui s'y oblige d'employer tous les moyens convenables pour entrer en possession et jouissance du dit emplacement, d'intenter et supporter tous procès à cet égard, le tout à ses frais.*" The heirs of Rosalie Bertrand, in representation of their mother, as one of the heirs of Thomas, did not join their co-heirs in the act, and their portion never was sold to Lafon. The record further shows, that the Bertrands had ceased to occupy the lot from 1812; that about the year 1817, the Corporation bought certain lots of two individuals; that in 1822 there was no trace of any house or improvement on said lot; and that, at that time, the Corporation widened the levée, and extended a portion of it, and of the public road, over a part of the lot in dispute.

Lafon, immediately after the sale, took certain steps to obtain a patent from the government. He carried on a correspondence with his friends at Washington, particularly with one Poumairat, who was charged by him to attend to the business, but died on the 29th of September, 1820, leaving an olographic will by which he appointed Poumairat and Gravier his testamentary executors, and named his brother Pierre Lafon, as his universal legatee. After Lafon's death, Poumairat continued to exert himself in obtaining the patent, which a few months afterwards, (17th of February, 1821,) was signed by the President, and Poumairat came to New Orleans. It appears from the testimony of one of the defendants, (E. Mazureau,) taken in the Court of Probates, in 1822 and 1823, that the patent and other title papers were put into his, Mazureau's hands, by Poumairat, with a request to institute a suit against the city corporation in order to put the estate in possession of the property; but it does not appear that any such suit

was instituted, owing to certain reasons disclosed by the evidence, which we shall have occasion to notice hereafter.

The sale to the defendants Cucullu and De Armas, under whom their co-defendant, Mazureau, holds, was passed by authentic act, on the 6th of May, 1830. It was executed by Manuel Bertrand and Joseph Bertrand, and by the heirs of Taquino, (Rosalie Bertrand's heirs,) as the only and legitimate heirs of the late Catharine Gonzalez, widow of Thomas Bertrand, deceased. It describes the lot sold, and refers to the patent issued and signed by the President of the United States, in the name and in favor of the said Catharine Gonzalez; recites that said lot was inherited by the vendors from their father and mother; and states, that it was made for and in consideration of the sum of $12,000 cash. On the same day, however, (the date of 6th of April 1830, on the document is evidently a mistake,) a counter-letter was executed under private signature by the parties, stipulating the same price, which the vendees promised to pay to the vendors, "*aussitôt que nous serons en possession et en jouissance paisible de la propriété du dit lot de terre en son entier, et que nous n'aurons aucune raison de craindre d'y être troublés, et que le dit acte de vente*, (by notarial act, above referred to,) *aura été ratifié par ladite Adelaide Taquino à sa majorité.*" It further stipulates: "*Il est bien entendu que si nous ne pouvons obtenir une jouissance et une possession paisible de la dite propriété, que nous ne pourrons jamais être tenus de payer aux dits héritiers de Thomas Bertrand, ou à qui que ce soit, aucune somme d'argent, ou partie de somme, sous quelque prétexte que ce soit.*" The sale was subsequently ratified. On the 14th of September, 1831, Mazureau, as counsel for his co-defendants, instituted a suit against the city corporation; said suit was decided in favor of the plaintiffs by a judgment of this court, rendered in February, 1833, and *they were put in possession of the lot.* They erected three brick buildings upon it, at an expense of 25,000, and on the 21st of December, 1833, they conveyed to Marzureau one-third of the lot and buildings, for the sum of $12,200. It further appears, that two of the branches of heirs of Thomas Bertrand received their portions of the price, to wit: $4000 each; but that the $4000 coming to Manuel Bertrand's heirs are still unpaid,

owing to the pendency of this suit, which was instituted on the 2d of March, 1835.

Thus, it is shown, and this is even admitted by the plaintiffs' counsel, that his clients can only pretend by virtue of their sale, to claim two-thirds of the property, the other undivided third belonging at the time of the sale to Lafon, to the minor heirs of Rosalie Bertrand, deceased; that Joseph Bertrand, vendor of one of the other two-thirds, being born on the 2d of February, 1799, was yet a minor at the time of the sale, and has never ratified it; that Lafon, or his representatives, who had obtained the patent, were never put in possession of the lot, and never brought any suit for that purpose; that his said representatives never paid the price of the property, as said payment of price was only the result of their successful exertions; that the same lot was sold again subsequently by the heirs of Bertrand to two of the defendants, who transferred one-third thereof to their co-defendant after having been put in possession of the property; that agreeably to the conditions of the counter-letter, they brought a suit to obtain said possession against the city corporation, which suit was brought to a successful termination; and that the original purchasers, Cucullu and De Armas, have paid two-thirds of the price, the other third remaining unpaid and in suspense on account of the present suit.

With regard to the other facts of the case, disclosed by the answers of the defendants to the interrogatories propounded to them by the plaintiffs, and by the evidence adduced on both sides, it will only be necessary to notice them hereafter, as they may then become important for the decision of the questions that may fall under our investigation.

Under the state of facts above noticed, and taking the respective sales of the parties as the main subject of their controversy, the first question which presents itself to our solution, is one of title, to wit: Which of the sales from the same vendors ought to prevail, and, consequently, who has the best title to the property in dispute?

This question is one of great importance; it is not free from, nay, it is even full of the greatest difficulties, and the conclusion which we have adopted is the result not only of the most strict

and minute examination and attention which we have been able to bestow upon the subject, but also of our long and mature deliberation. The case has been ably and elaborately argued on both sides, and the assistance we have derived from the very able written arguments of the learned counsel, has contributed in no small degree to bring us to such conclusion.

The plaintiffs say, that they claim the lot, because they have a notarial sale whereby it became their property; and that they attack the sale to the defendants, because it was the property of another and therefore null. The defendants assert, that the property never was delivered to the plaintiffs; and they contend, that such a sale without delivery and without the payment of the price, is not perfect, does not transfer the thing sold; and that, if the vendee sells the property a second time, the second sale, with delivery, must prevail over the first where no delivery has taken place. They further pretend, that the only remedy of the vendee without delivery, is the action *ex empto*, which is an action of damages against the vendor.

The respective positions of the parties mainly depend, upon a proper and correct interpretation of the laws which governed the State at the time of the first sale,. At that time, besides our Civil Code of 1808, the laws of Spain were yet in force in Louisiana so far as their provisions had not been repealed by, or were not contrary to those of our Code, and were also used and referred to in most cases as the basis of construction or interpretation of the new laws.

Art. 4, p. 366, of the old Code, relied on by the plaintiffs' counsel as conclusive as to his clients' rights, says: "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although said object has not yet been delivered, nor the payment made." This article however is preceded by art. 1, p. 344, which gives the definition of the contract of sale to be: "an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself;" and is followed by art. 24, p. 349, which says, that "the seller is bound to two principal obligations, that of delivery, and

warranting the thing which he sells;" by art. 36, p. 350, which provides, that "the seller is not bound to make a delivery of the thing, if the buyer does not pay the price, and the seller has not granted him any term for the payment;" by art. 82, p. 360, which says, that "the principal obligation of the buyer is to pay the price on the day and at the place mentioned in the sale;" and by art. 86, p. 360, which states, that "if the buyer does not pay the price, the seller may sue for the dissolution of the sale." Thus it would seem from these texts, that although the property, and we should say, the right of property, is acquired to the purchaser *with regard to the seller only*, as soon as there exists an agreement between them as to the thing and the price, the thing itself is irrevocably acquired by the purchaser only after he has paid the price; and that if such thing has not been delivered at the time of the sale, such delivery cannot be claimed by the purchaser, unless he has paid the price, or unless time has been granted to him to make the payment. There is clearly a vast difference between the right of property acquired by the purchaser with regard to the seller, and the right to the thing itself, which he cannot be said to have acquired, before he has paid the price; this latter right is called *absolute ownership;* which, according to art. 1, p. 102, of the old Code, "gives a right to enjoy and to dispose of one's property in the most unlimited manner." See also arts. 480, 482, 483, 484, of the present Code. It is not the thing which is acquired *of right*, but only a right to have the thing, to demand it from the vendor. The sale is perfect in this sense, that the purchaser, on his complying with the conditions of the contract, may demand the object sold, and that the vendor cannot refuse to deliver it; but the thing is not yet his; his right to it is imperfect, is incomplete, until he has put himself in a condition to say, "*it is mine*," and to enjoy and dispose of it *in the most unlimited manner*. This shows, that taking all the dispositions of the law together, as long as there is not a delivery of the thing, or a payment of the price, the sale, although perfect between the parties as to the right of property, that is to say, as to the right to demand the thing on the part of the seller, such right at least with regard to third persons, is yet inchoate; and does not become complete, until possession of the thing itself

has been delivered and the purchaser has performed his principal obligation which is that of paying the price. Art. 26, p. 350, defines delivery to be "the transferring of the thing sold, (not the transferring of the right to the property,) "into the power and possession of the buyer." This again makes the distinction between the right to the thing itself, and the right to demand the thing; this right to demand may exist without the thing being in the power and possession of the purchaser, and under art. 36 following, it cannot be exercised, unless the price has been paid or time has been given. This is the purport of the law 46, Partida 3, tit. 28, which says: "*Empero, si el que ouiesse vendido su cosa a otri, le apoderasse* della; si el comprador non ouiesse pagado el precio, o dado fiador, o peños, o tomado plazo para pager; por tal apoderamiento como este non passaria el señorio de la cosa, fasta que el precio se pagasse. Mas si fiador, o peños ouiesse dado, o tomado plazo para pagar, o si el vendedor se fiasse en el comprador del precio; estonce passaria el señorio de la cosa a el por el apoderamiento, maguer el precio non ouiesse pagado. Empero tenudo seria de lo pagar." This law clearly demonstrates, that the property in the thing sold will not pass to the purchaser until he has paid the price, and that he will not be allowed to demand it unless he has given security for the payment of the price, or has obtained a term for such payment, which term should be definitive, and not left to his discretion; and thus the sale cannot be said to be complete, as long as the price has not been paid. See also L. 5, ff. De præscriptis verbis; and L. 19, ff. De contrahenda emptione. Domat, book 1, tit. 2, sec. 3, No. 1. "*L'acheteur n'est rendu le maitre de la chose vendue que par ce payement, ou autre sureté qui en tienne lieu.*" Pothier, Vente, Nos. 319, 320, 321. Gomez, Variæ Resolutiones, tom. 2, ch. 11, § 17.

Here, it is true, Lafon or his representatives, having only acquired by virtue of their sale a right to the property, and to demand the thing sold from their vendors, might have claimed the delivery thereof from their said vendors, after the expiration of the delay, or on the happening of the event stipulated in the sale as the second condition, on paying the price stipulated in the contract, if the thing sold had remained, and was in the posses-

sion of their said vendors; and it cannot be doubted, that in ordinary cases, the sellers would have been bound to make such delivery, on the payment of such price. But it is also true, that the event upon the happening of which Lafon was to pay the price, never took place; that no time is specified in the act within which Lafon is to perform the condition; that by the contract, he was to take certain measures to obtain the possession and enjoyment of the property, not as against his vendors, in whose possession the thing was not at the time of the sale, but as against others, against whom suits were to be instituted for that purpose; that no suit was ever brought by him or his heirs, nor any proceeding had to obtain such possession; that the payment of the price, and the right of the vendors to claim it, depended upon the result of his exertions; that neither he, nor his representatives, ever had the possession of the lot; that several years had elapsed between the issuing of the patent and the second sale, without any step being taken by the plaintiffs to obtain the possession and enjoyment of the property; and, suppose the defendants' vendors had themselves instituted the suit necessary to attain the object of the sale, and had succeeded to recover the lot and taken possession of it, what would have been the consequence? Could the plaintiffs have called upon their vendors for the delivery of the thing, on offering the price? or would they not be barred by their having failed to comply with the condition? Certain it is, that at the time of the second sale, their right to the thing sold was yet inchoate; that they had never become the absolute owners or masters of the said thing, and that although they had a necessary delay, for complying with the second condition of the contract, their silence during at least seven years, was perhaps a presumption that they had abandoned the speculation, and this may have induced their vendors to sell it to others. Be this as it may, the laws in force at the time of Lafon's purchase, had provided for a case like the present, and we think they ought to govern it: The law 50, Partida 5, tit. 5, says: "Una cosa vendiendo vn ome dos vezes a dos omes en tiempos departidos &c. Otrosi dezimos, que si el postrimero comprador passasse a la tenencia, e a la possession, e pagasse el precio, que el la deve aver, e non el primero. E es otrosi el vendedor tenudo de tornar el precio si lo avia re-

cebido, con los daños, e los menoscabos, que vinieron por esta razon al primer comprador." And Gregorio Lopez, in his commentary on this law, says: "*Quia in traditione consistit tota virtus alienationis, quia ex ea, et non ex venditione, transfertur dominium.*" It seems from the terms of this law, that the second sale must prevail, if it has been followed by the delivery of the thing, and the payment of the price; and that the only remedy of the purchaser is, to claim the reimbursement of the price he may have paid, with damages. Gomez, Variæ Resolutiones, *loco citato*, puts the question: "*Item quæro, si aliqua res vendatur duobus, vel pluribus diversis temporibus, quis eorum præferatur? Dico quod ille præfertur, cui prius res fuerit tradita.*" It is true he says also: "*Secundo principaliter limita, et intellige, ut procedat, quando secunda venditio alteri facta, fuit celebrata bona fide &c., secus &c., primus emptor poterit rem et traditionem revocare actione in factum revocatoria.*" And this is in concordance with the commentary of Gregorio Lopez on the law 1 of the 5th Partida, tit. 5; and with Pothier, Vente, Nos. 319 and 320; but this part of the case belongs to another branch of the question, which we shall hereafter examine. Pothier, however, in his Contrat de Vente, No. 320, says: "*De-là il suit que si le propriétaire d'une chose, après l'avoir vendue à un premier acheteur, sans la lui livrer, avait la mauvaise foi de la vendre et livrer à un second, ce serait à ce second acheteur que la propriété serait transférée. Le premier n'aurait qu'une action personnelle contre le vendeur pour ses dommages,*" &c. Denizart, *verbo*, Vente, vol. 4, p. 609. It is clear, therefore, that the only relief the first purchaser would be entitled to, would be the action *ex empto*: "*Qui,*" says Pothier, "*est une action simplement personnelle, qui ne peut avoir lieu que contre le vendeur et ses héritiers,*" &c. See Pothier, Vente, Nos. 61, 62. Villadigo, Instruccion Politica, p. 325, Nos. 62, 63, 64, 65.

But it has been urged, under art. 20, p. 348 of the Code of 1808, that "*the sale of a thing belonging to another is null.*" We have already said, that although the right to the property had been acquired by Lafon, still he had never acquired his right to the thing itself under the contract, inasmuch as he never was in a situation to be able to demand it, to wit, by complying with

the conditions of the sale. Then, the thing was not absolutely his at the time of the second sale; and it cannot be said, that the lot was a thing belonging to another. But the sale of the thing of another is only null, when the vendor thereof has no title or right whatever to it. It is null in a certain sense, that is, so as not to operate a transfer of the property against the real owner; but it is not null in a certain other sense, as respects the parties, since it may give rise to damages. If it was absolutely null, it would produce no effect—"*quod nullum est, non producit effectum;*" and, on referring to art. 3451, of our new Civil Code, we see that "by the words *transfer the property*, (used in the preceding article,) the law maker understands *not such a title, as shall have really transferred the property*, but a title, which by its nature, would have been sufficient to transfer the property, *provided it had been derived from the real owner.*" Thus, a certain effect is given to such a sale; it may be the basis of a *just title*, sufficient to prescribe under; and if it was absolutely null, it would have no such effect. By the law 19, Part. 5, tit. 5, it is provided, that if a man sell a thing belonging to another, the sale will be valid. But here, again, the lot could not be considered as being the thing of another; Lafon and his representatives had nothing but an inchoate title thereto; it was not complete, and never was in a condition to be completed; the vendors had not lost the right of dissolving the contract, and of disposing again of the property as their own, if the conditions were not complied with; and it seems to us, that under the doctrine above recognized, and the laws quoted, the plaintiffs never acquired the right of considering the lot as theirs. If so, it could be sold a second time, as it was not the thing of another.

We think we have fully demonstrated, that the second sale made by the heirs of Bertrand to Cucullu and De Armas, ought to prevail over that to Lafon, and that the defendants are entitled to keep the lot, unless from the evidence it has been shown, that the vendees were in bad faith, and that the object of the second sale was to defraud the plaintiffs. This will be the subject of the next branch of the case.

The sale made to two of the defendants was executed in May, 1830, and the patent to the lot was signed by the President, in

February, 1821, after Lafon's death. Poumairat, who had acted as his agent in his efforts to obtain the patent, was one of his testamentary executors, and he came to New Orleans immediately afterwards, and left it in the hands of the defendant Mazureau, with a request to institute a suit against the corporation, in order to put the estate in possession of the lot; he gave Mazureau at the same time the survey of the lot, and showed him a transcript of the notarial sale to Lafon, which, so far as Mazureau recollects, was not certified. A short time afterwards, Pierre Lafon came to Louisiana; he was the universal legatee of his brother; and misunderstandings broke out very soon between him and the executors. Contestations arose which lasted a long time, and in which, in 1822 and 1823, Mazureau gave his testimony, in which he stated his communications with Poumairat in relation to the lot and to the titles. On the arrival of Pierre Lafon, (in 1821,) Mazureau was by him engaged to continue the management of the business, and he consented to act as his counsel against the executors; Poumairat was then absent, but soon returned, and felt disposed to settle the matter amicably; and it was at that time that Poumairat delivered to Mazureau the titles to the lot. Some time afterwards, Pierre Lafon grew impatient, reproached Mazureau with neglect, and the latter getting tired of his clients, returned their papers, after which they employed Canonge. Mazureau had nothing further to do with Lafon's estate; he had never made any contract with P. Lafon, nor received a fee from him. In May, 1822, Grymes and Canonge became Lafon's counsel. The executors filed an account, to which opposition was made by the heirs; the lot in question was alluded to in their answer. In 1823, Mazureau's testimony was again taken in relation to the lot, and he said, that the patent belonged to B. Lafon, as he had purchased the right thereto. It appears also, that the patent and survey remained in Mazureau's possession, and that he found it at a later period when he removed to a new office; he then requested Antoine Abat to inform the persons concerned, that he had those papers in his hands, and that they were at their disposal; and by persons concerned, he meant the heirs of Lafon, with whom he had no relations since 1823, and Bertrand's heirs, whom he did not know. It is also shown by the interrogatories,

that in 1828, a copy of the sale to Lafon was left at Mazureau's office, he thinks, by Moreau Lislet, and that he and Moreau examined it very attentively, and concluded that it was good for nothing. The object of the examination was to ascertain whether there was any chance of success, in case they should bring a suit to obtain the possession of the property under that act, in which suit, Moreau Lislet proposed to Mazureau to join him. It is not shown, that Poumairat had any further communication with Mazureau, since 1823.

With regard to the defendant De Armas the record shows, that he was employed as counsel by the attorney in fact of one of the plaintiffs; that he acted as such during the litigation with the executors, from 1823 to 1827, during which the executors made the allegations concerning the lot. De Armas' answers to the interrogatories prove, that he is not positive as to the time he acquired the knowledge of the sale to Lafon; he thinks it was about the 6th of May, 1830, but that it might have been previously; but there is no proof that he was aware of the existence of the sale, whilst he was counsel, other than a mere presumption that he might have known it, in defending the interest of his client, in the litigations and discussions concerning the delivery of the estate to the heirs by the executors.

From this evidence we are unable to see, that any fraudulent intention existed on the part of De Armas, when he and Cucullu, against the latter of whom no such pretence can be raised, purchased the lots from the Bertrands. True it is, he had been the counsel of one of the plaintiffs, but not for the purpose of recovering possession of the lot; his employment was in different matters altogether; and we cannot, even if we could presume it, assert it as a fact established, that he was sufficiently acquainted with Lafon's title to the lot, to have ascertained that it was defective, or that it could be defeated by getting a second sale from the same vendors. The fraud, or intention to defraud, if any there was, is not brought home to him; it cannot be presumed; and it does not seem to us extraordinary that he should have, in 1830, three years after his services as attorney had ceased, made a purchase, from which he was to derive a certain profit, jointly

with another person, against whom no allegation of fraud is made, or can be made.

As to Mazureau, the third defendant, we are not prepared to conclude from the evidence adduced, that his employment by his co-defendants in the suit against the City Corporation, and the sale made to him in 1833, were the consequence of any fraudulent intention on his part, to avail himself of the defect that may have existed in Lafon's title, as derived from Bertrand's heirs. It is true, he knew of the existence of the sale to Lafon, but he had ceased to be the counsel of the heirs since 1823; nay, he states that he had no further relations with them, since that time; and although it would perhaps have been his duty to bring the suit, when he was employed by Poumairat, who had trusted him with the title papers, yet circumstances are shown from which his negligence, if it may be called so, cannot be attributed to any fraudulent purpose. A knowledge of the sale, without fraud, is insufficient. It is not pretended, that any compensation for his services was ever agreed on between him and Poumairat; on the contrary, it is proved that the parties interested were litigating between themselves; that he was employed against the executors; that he returned the papers to his clients; that he received no fee from them; and that he had nothing to do with the estate since 1823. They employed other counsel, through whom they were at liberty to institute their suit against the Corporation; this they never did; they lost sight of their rights; and if, seven years after Mazureau had ceased to be their counsel, the lot was sold to other persons, who employed him to prosecute the claim, we cannot say that there is any fraud, or even unfairness, in his accepting the defence of his new clients. Certain it is, that he was not the counsel of the heirs of Lafon, at the time of the sale in 1830; there is no proof that he had any hand in procuring that sale; that he made any disclosure of the knowledge he had of the titles; that he had originally any interest in the purchase; nor that, in accepting to act in the suit against the city, he was prompted by any improper motive of taking advantage of the defective title of the heirs of Lafon, to make an undue speculation. They had lain dormant for more than seven years: other persons may have thought that they did not intend to exercise their rights; their

act of sale was an authentic and notarial one, subject to be looked at and read by any one; they were bound to proceed under their contract within a reasonable time; they could not deprive their vendors, by their negligence, of the value or price of the property; and if third persons are to benefit from a similar speculation, for which they have given six times as much as the plaintiffs were to give, they cannot attribute it to any fraudulent act of their opponents. "*Leges vigilantibus, non dormientibus serviunt.*"

We have been referred to the case of *McMichael* v. *Davidson*, 7 Robinson, as a case in point on this subject, but it does not seem to us to be applicable. There, Davidson had been acting as the counsel of the person whose rights he attempted to defeat; he stood in no other relation with the plaintiff than that of attorney and client; and we said, that the attorney, owing fidelity to the client, was bound to hold on to any advantage he had acquired for the latter, and could not gratuitously part therewith. This case is quite different; and, notwithstanding our disposition to hold attorneys at law, who derive their authority to act as counsel from licences obtained from this court, to the strictest principles of honor and probity towards their clients, in the practice of their noble profession, and to allow them no benefit from any undue advantage which they may get over the persons who entrust them with their business, we have been unable to discover in the evidence any fact going to show, that the two defendants against whom fraud or improper conduct has been alleged, deserve to lose the benefit of the transaction on which their defence is based, or merit our unqualified disapprobation.

On the whole, we conclude that, independently of other views under which the plaintiffs' claim could be defeated, it is sufficient that their sale was inchoate, and that they never acquired the right of being put in possession of the lot, before it was sold to the defendants; and that nothing shows that the second sale, which, we think, must prevail, was not a fair and honest transaction.

Judgment affirmed.

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* *Janin* for a re-hearing. The court have declared that no title passed to Lafon for want of delivery and payment of the price. It is admitted, that such was the Roman, Spanish, and the old French law; but these laws were repealed by the

Code of 1808, which is identical with the new Code. Art. 4, p. 346 of the old Code, art. 2431 of the present Code, and art. 1583 of the French Code, say, in the same words, that "the sale is considered to be perfect between the parties and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and the price thereof, although that object *has not yet been delivered, nor the payment made.*" Art 38, p. 266 of the old Code, the same as art. 1903 of the present Code, and art. 1138 of the French Code, say: "The obligation to deliver the thing is perfect, through the mere consent of the contracting parties. It renders the creditor the owner, and makes the thing to be at his risk, from the time when it was to be delivered, although the delivery may not have taken place, unless the debtor delay to deliver it, in which case the thing remains at the risk of the latter." All the French commentators agree, that these articles were enacted for the purpose of changing the old law which made the perfection of the sale dependent upon delivery and payment. Being contrary to the old law they repealed it, and the effect they produced in France they produced in Louisiana.

Even by the Spanish law, the title and full ownership was transferred to the purchaser before the payment of the price, provided time was given for such payment. Partida 3, tit. 28, law 46.

"This law," the court proceed to say, "clearly demonstrates that the property in the thing sold will not pass to the purchaser until he has paid the price, and that he will not be allowed to demand it, unless he has given security for the payment of the price, or has obtained a term for such payment, *which term should be definite and not left to his discretion*, and that the sale cannot be said to be complete as long as the price has not been paid."

Now, the price or consideration stipulated by Lafon was, that he should, at his own expense, take all necessary measures to perfect the title and acquire possession, and that he should pay $2000 as soon as he should be in the peaceable possession and enjoyment of the property.

Did "*the seller not trust the purchaser for the payment of the price?*" To this the court have replied, that "*the term should be definite and not left to the discretion of the purchaser.*" This distinction is not in the words nor in the spirit of the law. No authority supports it. But a term may be designated as well by the happening of an event as by naming a day. *Id certum est quod certum reddi potest.* Pothier, Vente, No. 323, says: "*Lorsque le vendeur a bien voulu faire crédit du prix à l'acheteur, la tradition qui lui est faite de la chose lui en transfère la propriété avant qu'il en ait payé le prix.*" So also says Justinian, Inst. De rer. divis. § 41, "*Si is qui vendiderit fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri.*" In the case of *Ferrari's Administratrix* v. *Lambeth and others*, 11 La. 107, a case also governed by the old Code, Gravier had sold the same property twice. The first purchaser sued the second in possession, and prevailed. Non-payment of the price was also the main defence, and it was held that, under the old Code (p. 360, arts. 87 and 88,) different in this respect from the Spanish law, a sale was never null, *ipso facto*, on account of the non-payment of the price, but that the purchaser must be put *in mora* by a suit for the price.

Plaintiffs have paid a part, the most important part, of the consideration, by obtaining the patent. Do the defendants not maintain an absurdity when they

contend, that plaintiffs have no title, because they had not paid the $2000, when the sale had been expressly made for the purpose of enabling them to institute a suit? How could such a petitory action have been instituted without a title in the plaintiffs?

Plaintiffs have also proved such facts as constituted a delivery made under the old Code, if indeed a delivery had been necessary to the perfection of their title.

Art. 29, p. 320 of the old Code, which is entirely conformable to the Spanish and Roman law, says: "Tradition or delivery of immoveables is made by the seller, when he leaves to the purchaser the full possession of the same, by dispossessing himself *either by delivery of the titles, . . or by putting the buyer on the premises, or by letting him have a view of the same, or by consenting that he become the possessor*, &c."

Plaintiffs' delivery had all these requisites, and one of them would have sufficed. We shall only add a word concerning the delivery of the titles. The sale states that the titles were delivered to the plaintiffs at the time of passing the sale. One of them, the permission of settlement, granted by Governor Miro, the root of the title, is still in their possession, and was produced in evidence. The other titles were delivered by Lafon's executor to Mazureau. This delivery, which in the civil law is called the symbolic delivery, is sufficient for the purpose of acquiring both possession and prescription. Gregorio Lopez says in his second note to the 6th law of Part. 3, tit. 30, that there are cases in which possession is acquired without corporeal *apprehension*, as is seen in that law, and in the three following. And the second of these laws, (Part. 3, tit. 30, law 8,) is thus translated by Moreau and Charleton: "A man acquires possession of a thing by the delivery of the title to him." "Where one man gives another an estate, or any other thing whatever, and delivers to him the title he already has, or makes and delivers to him a new one, the donee will acquire possession of the thing, though it had not been delivered to him corporally." This law was commented on with great care and research by the Supreme Court, in the case of *Copelly* and *Deverges*, 11 Martin, 170. That was also a case in which the property had been sold twice, and the court fully admitted, that if the *original* titles had been delivered, their delivery would have produced the same effect against the second purchaser as the corporal possession of the thing. The same doctrine is maintained by Pothier, Vente, No. 332, and Gomez, Var. Res., No. 20, p. 18.

If the Spanish law had not been changed by the Code of 1808, and if plaintiffs had had neither tradition nor delivery, still their title would prevail. For the civil law says expressly, that if the second purchaser knew of the existence of the first sale, the first puchaser can, before delivery and payment, recover the property from him.

Speaking of a double sale of the same property, all the old Civilians agree that, as a general rule, the second purchaser must prevail, if the property was delivered to him, and not to the first. But they all acknowledge the exception we now contend for. So Gregorio Lopez, in a note to law 1, Part. 5. tit. 5, says, that if the second purchaser was informed of the first sale, the first purchaser has against him the revocatory action. Pothier, Vente, No. 320, says, that it is only from a second purchaser, ignorant of the first sale, *inscius prioris venditionis*, that

the property cannot be recovered back; and that if he knew it, the first purchaser has against him the revocatory action.

And Gomez, Var. Res. vol. 2, chap. 1, § 17, (p. 17,) says, that the prior delivery will avail the second purchaser only if he was in good faith; and that, in the contrary case, the first purchaser can recover both the thing and its delivery, in a revocatory action.

And we have seen that the authorities agree in considering a second purchase, made with a knowledge of a prior sale, as made in bad faith.

Re-hearing refused.

BENJAMIN FRANKLIN FRENCH and another, Commissioners for the Liquidation of the Atchafalaya Railroad and Banking Company, *v.* JOSEPH LANDIS and others.

Commissioners appointed under the act of 14 March, 1842, ch. 98, to liquidate a bank, may maintain an action against the late officers and directors for damages for maladministration of its affairs. Sects. 12, 24. *Per Curiam:* Any action against bank directors for maladministration may be maintained by their successors; and any action which the directors might have maintained, while the Corporation was in existence, to increase the fund out of which the debts of the body corporate are to be paid, may be instituted by the commissioners after its dissolution.

APPEAL from the District Court of the First District, *Buchanan*, J.

Hoffman and *Roselius*, for the appellants.

Peyton, and *I. W. Smith* for the defendants.

BULLARD, J. This is an action instituted by the commissioners appointed to liquidate the Atchafalaya Bank, against the late president, directors and cashier of that institution, to recover damages for the maladministration of the Bank previous to the decree of the court vacating its charter.

The defendants pleaded various exceptions: 1st. That the plaintiffs have no power to bring this suit; that there is no law authorizing their appointment; and that they have not been duly appointed and qualified: 2d. That as mandataries they, the respondents, are accountable only to the stockholders, whom the plaintiffs do not represent: 3d. That the petition is vague and indefinite. There are several other exceptions similar in character to the last; but as the case went off on the two first,

which alone appear to have been considered, and the latter exceptions do not go to the dismissal of the suit, but might authorize leave being given to amend in the discretion of the court below, we confine ourselves to the question, whether the court erred in sustaining the two first exceptions, and in deciding that the commissioners have no authority to maintain this action, and that if any such right of action exist, it can only be prosecuted by the stockholders.

The commissioners derive their authority from the act of the Legislature of 1842, entitled "an act to provide for the liquidation of Banks." The 12th section provides, that "they shall forthwith demand from the board of directors of the Bank, or such officer, or officers, as they may delegate for that purpose, all the property and effects of every description thereunto belonging, and all books, accounts and papers thereunto pertaining, &c." It goes on to provide a mode of administration and distribution, and finally section 24th provides, "that in all matters not herein specially provided for, the powers, duties and liabilities of the commissioners shall be the same as those conferred or imposed on syndics of insolvent estates, and the proceedings the same as those provided by the acts now in force, relative to the voluntary surrender of property."

The analogy is striking between an insolvent who has made a *cessio bonorum*, and a corporation put in liquidation by virtue of the act of 1842. All the property, rights and actions of the insolvent become vested in his creditors, to be administered by the syndic. It never has been supposed, that an insolvent, after his surrender, could maintain an action against a faithless agent, or mandatary. Such an action, and even a right to maintain revocatory actions, passes to the syndic, and can be maintained by him alone for the benefit of the creditors. By the decree of forfeiture, the corporation no longer has the faculty of suing in its corporate name; and as it relates to delinquent debtors, or unfaithful mandataries, it cannot be conceded, that the right of action vests from that moment in the corporators individually. In the case of *Percy et al.* v. *White et al.*, decided in May, 1844, we held, that the action against Bank directors for maladministration, might be maintained by their successors in the direction. Now

we think that any action which the directors might have maintained, while the corporation was in existence, tending to increase the fund out of which the debts of the body corporate are to be paid, may well be instituted by the commissioners after its dissolution. The stockholders may still be called on to pay what may be due on their stock, as a part of the assets, and may be entitled to any residue after all the liabilities of the Bank shall have been paid. See *Millaudon* v. *Carrollton Bank*, 5 Rob. 488.

By the 23d section of the act, two commissioners are competent to do any act, except to pledge or mortgage property.

It is contended by the appellees' counsel, that the judgment is correct, by reason of the misjoinder of parties; that the defendants are sued in different capacities, charged with responsibility for different acts, and on different causes of action, and that some of the allegations are inconsistent with each other. To this it may be answered, that the court below did not decide upon such a point, and that no injustice can be done, as each party has a right to plead separately, and have a separate trial and judgment; and that the court below will allow such amendments as may be necessary and proper.

The evidence in the record satisfies us, that the commissioners who sue, have been duly appointed and qualified.

It is, therefore, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and that the case be remanded for further proceedings, according to law; and that the costs of the appeal be paid by the appellees.

Same Case.—On a Re-hearing.

Plaintiffs, commissioners for the liquidation of a bank, having sued the cashier and his sureties in his official bond, for damages for misconduct of the cashier, instituted, pending the first suit, a second action against the cashier, president, and directors for malfeasance. The demand in the first case was limited to the amount of the official bond of the cashier. On an exception by the cashier of *lis pendens*: *Held*, that the action cannot be divided, and a part of the damages sued for in one case, and a part in the other; and that the cause of action being the same, though the amounts demanded are not, the exception should be sustained. C. P. 335.

G. Strawbridge, for C. Harrod, prayed for a re-hearing.

BULLARD, J. In this case a re-hearing was granted, as relates to C. Harrod, the late cashier, upon the question alone arising on his exception *litis pendentis*.

It appears by the record, that the plaintiffs had already instituted a suit against Harrod and his sureties on his official bond, which was pending at the time this action was brought. The allegations of the petition in that case show, that the cause of action is the same in both cases, to wit the official misconduct of the cashier, although the amount demanded is not the same. In the first suit the amount is fifty thousand dollars only, which is the limit of the liability of the sureties who are sued with him. But it is clear, that the action cannot be divided, and a part sued for in that case and a part in this. If judgment were rendered against the defendant in that case, for the sum demanded as damages for malfeasance in office, we think it clear it could be pleaded in bar to the present action founded on the same cause. Code of Pract. art. 335. 9 La. 386. Merlin, Repert. de Jurisp. *verbo*, Litis Pendence.

It is, therefore, ordered and decreed, that the judgment of the District Court, so far as it sustained the exception of Charles Harrod, be affirmed; and that, in all other respects, the judgment first rendered by this court remain undisturbed; and that the case be remanded for further proceedings according to law.

JAMES MITCHELL, Natural Tutor of his Minor Children, *v.* THOMAS JEFFERSON COOLEY.

A natural tutor, though the law does not require him to be confirmed or appointed by the judge, must, like other tutors, take an oath before he can act as such. C. P. 949. And where an action has been commenced by a natural tutor before taking such oath, it will be dismissed on an exception to his want of authority.

APPEAL from the Commercial Court of New Orleans, *Watts*, J.

J. and *G. Strawbidge*, for the appellant.

Cooley, *pro se*, contended, that the plaintiff was not authorized

to act as tutor, not having been sworn as required by law. Civ. Code, art. 328. Code of Pract. art. 949.

MORPHY, J. The appeal is from a judgment of nonsuit rendered upon an exception taken to the plaintiff's right and authority to sue as the natural tutor of his children, on the ground, that he was not qualified to act in that capacity, never having taken the oath required by law. It is urged in behalf of the appellant, that it is not necessary for the natural tutor to take any oath before he enters upon the discharge of his official duties, and articles 265 and 268 of the Civil Code, are relied on in support of this position. They provide, that the tutorship by nature takes place of right, on the dissolution of the marriage by the death of one of the spouses, but that every other kind of tutorship must either be confirmed or given by the Judge. The French commentators on the corresponding articles of the Napoleon Code, to which we have been referred by the counsel, can assist us but little, as no oath is required by that Code from any kind of tutor; whereas art. 328 of our Code requires an oath of office to be taken by both the tutor and the under-tutor, before they can enter upon the exercise of their duties. This requirement, it is true, is not mentioned in the section of the Code relating to the tutorship by nature, nor is it in the sections relating to the other kinds of tutorship; but it is to be found in that which treats of the administration of the tutor in general. Hence it should seem, that all tutors are required to take an oath, and that, although the surviving father becomes of right the natural tutor of his children, and need not, like other tutors, any confirmation or appointment, he is nevertheless as much bound as the latter to fulfil that formality. If there could be any doubt on the subject, it is removed by article 949 of the Code of Practice, which, in express terms, requires an oath to be administered to the father who claims the tutorship of his minor child. The case of *Verrett et al.* v. *Aubert*, quoted from 6 La. 350, was that of a testamentary tutor who had assumed to act as such without being confirmed, taking the oath, or giving security as required by law. After enumerating these several requisitions, the court remarked generally, that the only exception (with regard to them) had relation to tutors by nature and to no others. What the court then said can surely

not be considered as deciding a point which did not present itself in the case; but at our last session in the Western District we had the question directly before us in relation to certain attachment proceedings instituted by a natural tutor, who had not qualified as such by taking his oath. On the exception being taken the suit was dismissed. *Mayes* v. *Smith*, 11 Rob. 503.

Judgment affirmed.

ISAAC BRIDGE *v.* SAMUEL W. OAKEY.

An inspector of elections who has illegally and maliciously prevented one from voting, will be responsible to the latter in damages.

APPEAL from the Parish Court of New Orleans, *Maurian*, J.

MARTIN, J. The plaintiff is appellant, from a judgment dismissing his suit on an exception of the defendant, whom he prosecuted with the view of obtaining damages, in consequence of his having been prevented from voting at the late presidential election, by the defendant, who was one of the inspectors. The plaintiff charged, that in so doing the defendant acted maliciously and without just ground.

The First Judge has not favored us with any of the reasons, nor the citation of any law on which his judgment is based. The plaintiff has not complained of this, but has built his hope of relief at our hands, on an allegation that he has shown a cause of action, thus denying the only ground of the defendant's exception, to wit: that, on the face of the petition, no cause of action is shown.

On the part of the plaintiff and appellant, it has been insisted, that the law gives a remedy for every wrong. The counsel of the defendant and appellee has likened the case of his client, to that of a judge who is not responsible in damages for his judicial opinions. To this it was replied, that inspectors of elections are not judges, and that although the latter may not be answerable in damages for erroneous judgments, they may be, when the injury they have inflicted does not proceed from error, but from

malice. The plaintiff's counsel is fully supported by the case of *Jenkins* v. *Waldron*, 11 Johnson, 114, which is one in point, and the grounds on which it was decided, conclusive.

The First Judge, in our opinion, erred in sustaining the exception.

It is, therefore, ordered and decreed, that the judgment be annulled and reversed, the exception overruled, and the case remanded for further proceedings; the defendant paying the costs of this appeal.

Rawle, for the appellant.

T. Slidell, for the defendant.

GEORGE KELLER and others, Heirs of Mary McCalop, deceased, *v.* JAMES McCALOP and another.

The son-in-law of a legatee is competent as a witness to the will. The relations and connections of a legatee are not incompetent to prove a will. C. C. 1585. Arts. 2260, 2261 of the Civil Code do not apply to witnesses to a will.

As a general rule, all persons are competent as witnesses to a will unless expressly excluded.

It is no objection to a will by public act, that it was not executed at the office of the notary, nor that it was executed on a Sunday.

Where a testament by public act recites, "that this last will was dictated by the testatrix to me, the said notary public, by whom it was written as dictated to me, and then read to the testatrix, who declared to have perfectly understood it and to persist therein, all of which was done in the presence of the said attending witnesses," it is sufficient proof that the will was read to the testatrix in the presence of the witnesses, that it was dictated by her at the time it purports to have been signed, that it was written as dictated, and that it was read to the testatrix by the notary.

The formalities prescribed by art. 1571 of the Civil Code for the execution of nuncupative testaments by public act, must be fulfilled at one time, without interruption, and without turning aside to other acts; but it is not necessary that express mention should be made in the will that they have been so fulfilled. It is for the party who attacks the will to show that they have not been so fulfilled.

A bequest by a testatrix of "all her property," includes moveables as well as immoveables, separate as well as partnership property, and all transmissible rights, whether dotal, paraphernal, or belonging to the community.

APPEAL by the plaintiffs from a judgment of the Court of Probates of West Baton Rouge, *Favrot*, J. This was an action by

the plaintiffs, to annul the will of Mary McCalop, deceased. The judgment below sustained the will.

Muse, *Merrick* and *Grymes*, for the appellants.

Lobdell and *W. D. Hennen*, for the defendants.

MORPHY, J. This is an action brought by the heirs at law of the late Mary Keller, to annul and set aside a nuncupative will by public act, wherein, after making a legacy of $5000 to her sister Nancy Keller, and ordering the emancipation of two of her slaves, the deceased left the balance of her property to her husband, James McCalop. A variety of points, or grounds of nullity have been presented by the counsel for the plaintiffs and appellants, of which we have deemed it necessary to notice only the following, which have been insisted upon at some length in this court, to wit:

I. That Noland Stewart, one of the subscribing witnesses to the will, was the son-in-law of James McCalop, the principal legatee, and therefore incompetent. It is urged, that in order to determine who are competent witnesses to a will, reference must be had, not only to articles 1584 and 1585 of the Code, but also to articles 2260 and 2261, which treat of the competency of witnesses in general; and that therefore, Noland Stewart was an incompetent witness, both on the ground of relationship, and of interest. These several articles of the Code apply clearly to two distinct classes of witnesses, and establish for each different qualifications. The former point out those persons who cannot be witnesses to testaments, and the latter refer to those called upon in judicial proceedings, to testify to any fact or covenant. This distinction, which results from the very language of the Code, was taken in the case of *Sigur's Heirs* v. *Sigur*, 12 La. 25, in which it was held, that the grand-father of a legatee in a will, was competent to attest it. The general principle in relation to the capacity of a testamentary witness is, that all persons are capable, with the exception of those who are excluded by some express law. In the French jurisprudence as it existed before the adoption of the Napoleon Code, relationship however close to a legatee, was not a ground of incompetency to serve as a witness to a will. Pothier, Donations Testamentaires, chap. 1, art. 3, § 3. Merlin, Rep. *verbo*, Témoin Instrumentaire, § 11, No. 111.

The law was modified in France on this subject, by article 975 of the Code, which prohibits either legatees, or their connections or relations to the fourth degree inclusively, from being testamentary witnesses; but the Louisiana Code, art. 1585, has adopted the prohibition only as regards the legatees themselves; its silence as to their relations and connections shows, that they were not intended to be excluded by our law-givers. *Expressio unius exclusio est alterius.* In the case of *Hebert's Heirs* v. *Hebert's Legatees*, in 11 La. 364, to which we have been referred, the only point decided is, that a witness who does not understand the language in which a will is written, is incompetent to attest it, such a person coming within the purview of article 1584, and being in no better situation than the deaf, who are therein expressly excluded, because unable to understand the will, when read to the testator in their presence. There is nothing in the reasoning or language of that decision to justify the inference drawn from it, that the qualifications required by art. 2260, for a witness to testify to a covenant or fact, are also essential to a testamentary witness. In the late case of *Sigur's Heirs* v. *Sigur's Legatees*, this court said,: "It is true that witnesses to a testament by public act, must possess not only the qualities required for that particular act, but for notarial acts in general; but it does not follow that they must be competent as judicial witnesses in any controversy growing out of the will." The same doctrine was recognized in the case of *Waters* v. *Petrovic & Blanchard*, 19 La. 592. See also 14 La. 28 and 15 La. 289, therein referred to.

II. That the will was executed on a Sunday, and not at the office of the notary public.

We are unaware of any law declaring, on pain of nullity, that the acts of a notary are to be passed at any particular place within the parish for which he is appointed. It is true, that the 5th section of an act approved the 3d of July, 1805, directs generally, that all notarial acts shall be executed at the office of the notary; but it provides at the same time, that, in case of sickness of a party or some other sufficient cause, the notary can pass them elsewhere. In the present case, the evidence shows, that the testatrix was confined to her bed, and her strength so much exhausted

that she could not have left her room. A subsequent law contemplates that notaries may pass acts out of their office, as well as in it, by providing that for the former they shall be entitled to double fees. B. & C.'s Dig. 443. In support of the objection that the will was executed on a Sunday, art. 207 of the Code of Practice, has been relied on. It provides, that on that day, and certain others therein named, no citation can issue, no demand can be made, no proceeding can be had, nor suit instituted, &c. This enactment relates, in our opinion, only to judicial proceedings; but it does not, we apprehend, prevent a citizen from marrying, or making any other contract on those days. It could hardly be contended, that an olographic will cannot be validly made on a Sunday or any other day of rest; if so, why should a person unable to write, through ignorance or physical infirmity, be deprived of the power of making a will on such a day, with the assistance of a notary? In France, it is only notarial acts which partake of a judicial character, such as inventories, protests, judicial partitions, &c., which cannot be executed on a Sunday; but it is otherwise with regard to wills, and to all other acts which are purely voluntary. Dict. de Droit Civil, *verbo*, Fête, Nos. 9 and 10; and *verbo*, Acte Notarié, § 3, Nos. 20 and 21. There is nothing in the Code of Practice, or in the act of the 7th of March, 1838, also relied on, which can authorize us to consider as null a will by public act, merely because it is executed on one of the days of rest therein prescribed. To avoid the will of the deceased on this ground, would be to pronounce a nullity not established by law, and for which there is no foundation in reason.

III. That the will does not sufficiently appear to have been read to the testatrix in the presence of the witnesses, nor to have been dictated by her at the time it purports to have been signed, nor to have been written as dictated, nor does it appear by whom it was read to the testatrix.

The clause of the will to which these objections apply, is in the following words, to wit: "This last will and testament was so dictated by the testatrix, to me, the said notary public, *by whom* it was written as dictated to me, and then read to the testatrix, who declared to have perfectly understood it, and to persist therein, *all of which* was done in presence of the said attending witnesses.'

The words, *all of which*, placed at the end of the sentence, clearly relate to each and every thing therein mentioned as having been done; to wit, the dictation of the will by the testatrix, the writing of it by the notary, the reading of it to the testatrix, and the declaration of the latter that she understood it. It was not necessary for the notary to use any particular, or sacramental expressions, to convey the idea that he had read the will to the testatrix in the presence of the witnesses. It is equally clear from the language used, that the will was written by the notary as dictated to him, and was then read by him to the testatrix. The relative *whom* refers to the antecedent *notary*, and the words, *by whom*, clearly relate to the second verb "*read*" as well as to the first "*written*." This construction, which is called for by the laws of grammar, is at the same time in accordance with that rule of interpretation which requires an instrument to be construed, "*ut res magis valeat quam pereat.*" As to the objection, that it does not appear that the will was dictated by the testatrix at the time it purports to have been signed, it results from the whole context of the instrument, that it was executed in the only way it was physically possible that it could be done, in relation to the time at which the several things necessary to its completion were performed, *id est*, that it was first dictated, then written, afterwards read, and finally signed.

IV. That it does not appear from the will, nor is it therein observed, that all the formalities to the same were performed at one time, without turning aside to other acts, and without interruption. This very objection was urged in *Featherstone* v. *Robinson*, 7 La. 599. This court then said, that the Code of 1808 required indeed that all the formalities in the will should be complied with without interruption, and without turning aside to any other act; but that it did not require that mention of this circumstance should be made in the will." Article 1571 of the new Code, prescribing the formalities of wills by public acts, is *verbatim* the same with the corresponding article of the old Code, p. 228, art. 92. But were this question presented for the first time, we would not have come to a different conclusion. Article 1571, after setting forth the different formalities to be complied with in making a nuncupative will by public act, says: "Ex-

press mention is made of the whole, observing that all these formalities must be performed at one time, without interruption, and without turning aside to other acts." The express mention here ordered to be made, clearly applies to all the formalities just before enumerated, but cannot be understood to refer to the subsequent injunction of the law-giver to the notary, that there must be no interruption, or turning aside to other acts in the fulfilment of such formalities. Had the word *observing* been used to signify "making mention in the will," as is urged by counsel, the following part of the sentence instead of reading, "that all these formalities *must be fulfilled* at one time," ought to have read, "that all these formalities *have been fulfilled* at one time," &c. The same requirement is made by art. 1578 for the validity of a mystic will. On proof being made that it has not been complied with, in the making of either of these kinds of wills, they would be avoided; but to require the mention contended for in either, would be to add another formality to those required by law. This point was again made in *Le Blanc* v. *Barras' Heirs*, 16 La. 82, in connection with the objection, that the will did not contain any mention of the residence of the witnesses in whose presence it purported to have been received. The case was decided on the latter objection, in relation to which the court said, that a nuncupative will by public act must bear on its face the evidence, that all the formalities required by law for its validity have been complied with, and that the fulfilment of these formalities, when not apparent from the instrument itself, cannot be established by testimony. A remark much to the same effect fell from the court, in *Faulkner and wife* v. *Friend, Executor*, 1 Rob. 48, in speaking of the difference between wills by public act, and those under private signature. The language used in these cases, to which we have been referred by the counsel for the appellants, is perhaps too broad for the point intended to be decided, to wit: that a will by public act must on its face establish its validity without recourse to evidence *dehors* the instrument, and that if any of the formalities required to be therein mentioned for its validity were omitted, they could not be proved by testimony, to have been complied with. We conclude then, that the fulfilment of the prescribed formalities at one time, without

interruption or turning aside to other acts, is a condition which must be complied with, but the mention of which is not required, and that it is incumbent on the party who seeks to annul the will to show, that this condition has not been fulfilled. Far from the plaintiffs having made any such proof, the defendants have shown, that the will was made in the manner required by law. Being then of opinion, that this will is valid as one by public act, it is unnecessary to examine the several objections made to its being considered as a will under private signature.

It is finally urged, that the will, if valid, does not purport to convey or transfer to James McCalop any other than the paraphernal and separate property of the testatrix, and not her interest in the com nunity of gains and *acquests*, which existed between her and her husband. The language of the testatrix is: "I bequeath to my sister, &c. $5000 in cash, to be paid to her at my decease, of the nett proceeds of my estate." "I give to my slaves, &c. their freedom, to take effect at the death of my husband, James McCalop;" and "I bequeath to my husband, James McCalop, all the rest or balance of my property, and that at my death," &c. There can hardly be any room for construction in order to arrive at the intention of the testatrix. The word *property*, comprises moveables as well as immoveables, separate as well as partnership property, and all transmissible rights, whether dotal, paraphernal or community. After deducting the legacies, the testatrix gives to her husband the whole, and not a part of her remaining property. It is not even shown that she had any other separate property than the two slaves, and yet she bequeaths to her sister $5000. This sum could only be paid out of her interest or share in the community property, the balance of which she wills to her husband.

Judgment affirmed.

JOHN C. POTTS and others, Commissioners representing certain Inhabitants of the Parish of Iberville, *v.* ROBERT C. CAMP.

Under the statutes of 9 March, 1827, and 17 March, 1828, authorizing certain inhabitants of the parish of Iberville to raise a sum of money by lottery, a majority of the commissioners are empowered to sue, for the benefit of the inhabitants, for money received by one of the commissioners, and converted to his own use. In such an action the commissioners cannot be required to name the inhabitants represented by them; nor will the objection that the plaintiffs had not given bond, as required by those statutes, avail a defendant who had also failed to give bond as a commissioner, and withheld money received by him.

One who has received money as a commissioner under a statute providing for the raising and disbursement of a certain sum in the improvement of a portion of a parish, and has expended a part thereof for the purposes contemplated by the act, though without authority from the board, under whose direction the money was to be disbursed, and without complying with other formalities prescribed by the act, may, in an action against him for the amount received, claim an allowance for the value of the work paid for by him. He cannot be forced to resort to a separate action to obtain the credits to which he is equitably entitled.

APPEAL from a judgment of the District Court of Iberville, *DeBlieux*, J.

BULLARD, J. This is a suit instituted by a majority of the commissioners appointed in virtue of an act of the Legislature in 1827, and a supplemental act in 1828, authorizing a lottery for the purpose of raising money to improve a part of the parish of Iberville. It is alleged, that the defendant, one of the commissioners, had sold the privilege of drawing such lottery for $4000, and retained the amount, and converted it to his own use.

The case was tried by a jury, whose verdict was for the full amount claimed, and the defendant appealed.

The appellant's counsel makes in this court the following points: 1st. That the petition is defective in not naming the inhabitants, and the court erred in not sustaining the exception.

2d. That the charge to the jury was erroneous and illegal, and calculated to mislead the jury.

I. The exception, in our opinion, was properly overruled. A majority of the commissioners had an undoubted right, under the statute, to institute the suit for the use of the inhabitants of a particular part of the parish as designated in the statute, without

naming all such inhabitants. The objection that the two commissioners who sue, had not given bond as required by law, ought not to avail the defendant, who had also neglected to give bond, but who received the money and withholds it.

II. The statute points out the manner in which the money to be raised, should be disbursed for the benefit of the inhabitants. The directions of the law had not been observed; but it was contended, that the defendant had expended a part of the amount in carrying out the views of the Legislature, in making the improvements contemplated, and that allowance ought to be made for such amounts as he could show were thus usefully employed, although in an irregular form and manner. But the court instructed the jury, that even if the defendant had applied a part, or the whole of the money so collected and obtained, to the collective use of the inhabitants, by improving in any degree their lands as contemplated by law, still if he had done so without authority from a majority of the board, and without complying with the form of advertising and adjudication to the lowest bidder prescribed by the acts of 1827 and 1828, and may possibly have an equitable right to be remunerated for his work, he has not that of obtaining in this action a set off, or compensation to the claim, if proved, of the value of such work. We think the court erred in this instruction to the jury. Equity forbids, that the defendant should lose what he has expended for the real benefit of the inhabitants, as contemplated by the Legislature, although he neglected the forms required by law. This indeed is not asserted by the court below; but the defendant being entitled, *ex æquo et bono*, to be compensated, we think he is not necessarily to be turned round to a circuity of actions to be reimbursed. Many analogous cases may be supposed, and indeed are of frequent occurrence. An administrator for example, who should have paid acknowledged debts, without the formal order of a Court of Probates, would yet, in his settlement with the heirs at law, be entitled to any allowance for the amount thus usefully paid, in discharge of the liabilities of the estate.

It is, therefore, adjudged and decreed, that the judgment of the District Court be reversed, and the verdict set aside, and that the case be remanded for a new trial, with instructions to the Judge

to abstain from charging as set forth in the bill of exceptions; and that the plaintiffs and appellees pay the costs of this appeal.

R. A. Upton, for the plaintiffs.

W. M. Randolph, *Downs* and *Moise*, for the appellant.

JAMES M. RILEY *v.* WHITMAN WILCOX.

A plaintiff may introduce any evidence necessary to disprove or rebut the allegations made by the defendant in his answer, though the facts offered to be proved by the former were not alleged in the petition. No replication being allowed, all new facts alleged in the answer are considered as denied. C. P. 329.

Where, in an action for wages as an overseer, plaintiff alleges that he was engaged for one year from the first of January, and that he performed the duties of an overseer from that day, he will not be allowed to show that, although he was engaged from that day, it was understood between the contracting parties, that he was not to take full charge of the plantation till the 6th of the month. If the contract was subject to such a condition, it should have been alleged.

APPEAL from the District Court of West Feliciana, *Boyle*, J.

SIMON, J. The plaintiff seeks to recover the sum of eight hundred dollars, which he alleges to be due to him by the defendant, under the following circumstances: He states in his petition that on or about the 27th of December, 1842, said defendant, by his authorized agent for that purpose, James Rucker, engaged his, plaintiff's, services as overseer, on his plantation recently purchased of Dr. Hereford, for one year, to commence on the first of January, 1843, and to terminate on the last day of said year, to which the plaintiff consented, and for which it was agreed that he, the plaintiff, should receive a salary of $800. That in pursuance of said contract, the petitioner commenced to perform his duties as overseer of the defendant on the first of January, 1843, and was ready and willing, and did continue in the due performance and discharge of his said duties, until the tenth of the said month of January, when the defendant without any just cause of complaint, sent away and discharged the petitioner from the further execution of his contract, and without his consent or approbation. That by his acting so, the defendant did actively

violate his contract, and put it out of the power of the petitioner to fulfil and perform his part thereof; all which entitles him to recover his whole year's wages. And that, although there was on the part of said defendant an active violation of his contract, he, the petitioner put said defendant in legal delay, or default, to comply with it, which was refused by the latter, &c.

The defendant first pleaded the general issue, and further averred, that the plaintiff, having undertaken to manage his, the respondent's plantation, did not perform the duties of a faithful and competent overseer, but neglected his business, frequently absenting himself at night, as well as during the day, and leaving the negroes on the plantation alone, without any white person being present, &c.

The defendant subsequently amended his answer for the purpose of alleging his having made to the plaintiff, before the institution of this suit, a legal tender of the sum of forty-five dollars, in full payment of the services of said plaintiff for the time he acted as his overseer, being the same services for which plaintiff instituted this action, and which tender said plaintiff refused to accept.

This case was tried by a jury, who returned a verdict in favor of the defendant; and said verdict having been adopted as the judgment of the inferior court, the plaintiff, after a vain attempt to obtain a new trial, took the present appeal.

The present action is based upon the 2720th art. of the Civil Code, which provides that, "*if, without any serious ground of complaint a man should send away a laborer, whose services he has hired* (la personne qui lui a loué ses services) *for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived.*" Thus, on the part of the plaintiff it is pretended, that he was discharged by his employer without any just cause or serious ground of complaint, and that, therefore, the defendant owes him the whole amount of his year's wages; whilst on the part of said defendant it is insisted, that he had good reasons to discharge the plaintiff, that the latter had failed to perform his duties, and had neglected the business for which he was employed, and that, therefore, he is entitled to receive nothing for his servi-

ces as overseer, except the sum of forty-five dollars, which said defendant appears to be willing to pay him, by his pleading a tender thereof in full payment of the services rendered during the time he acted as overseer.

It appears from the evidence, that the defendant having made the purchase of a plantation distant about seven or eight miles from St. Francisville, after having completed a partition of a number of slaves which belonged for one-half to his wife on another plantation; he, said defendant, having to leave for Baton Rouge, and to be absent for several days, and wishing to employ an overseer to take charge of the negroes, to move them on, and to manage the new plantation, authorized one James Rucker to engage the plaintiff for that purpose, and to give him $800 a year for his services. This contract took place in the latter part of December, 1842; and the plaintiff, having thus been employed by Rucker for the defendant, took charge of the negroes on or about the first of January, 1843, and with the assistance of other persons, removed them to the new plantation which remained under his charge until the defendant returned home, when, being dissatisfied with the plaintiff's manner of managing his farm, he, said defendant, discharged him. This was on the tenth of January.

It further appears, that while the defendant was at Baton Rouge, he wrote a letter to James Turner, (under whose employment the plaintiff was at the time,) dated 28th of December, 1842, in which he gives Turner to understand, that *having told Rucker to employ the plaintiff*, and *having received a letter from said Rucker that he had succeeded*, he would be willing to consent to said plaintiff's remaining with Turner, saying: "*There is a man here whom I can get, and whom I should be perfectly satisfied with; and, under the above circumstances, I would rather Mr. R. would return with you, by letting me know in time, that I may send him up before he leaves. This would suit me entirely, and if you think fit, and if you have no overseer yet, and can induce him to return, I should be glad.*"

Under the issues presented by the pleadings, the parties went into the examination of witnesses to prove facts which they deemed necessary in support of their respective pretensions. On the one hand, the plaintiff attempted to show, that he had been dismissed without any just cause or ground of complaint, that

his contract with Rucker was made under certain circumstances which prevented him, within the knowledge of the agent, from attending to his duties in a regular manner before the 6th of January; that his repeated and occasional absences from the plantation were occasioned by the situation of the place, &c., and by the defendant's failing to furnish provisions, bedding, &c.; and, on the other hand, the defendant endeavored to establish the reasons which caused him to discharge the plaintiff, who had neglected to perform his duties as overseer, &c.; when, on the production of the testimony of James Rucker and others, taken subject to all legal exceptions, the defendant's counsel objected to certain parts thereof being read to the jury, on the ground, that there was no allegation in the petition of the facts sought to be proved; that there was no authority alleged or shown in the witness and agent, Rucker, to give the instructions contained in the testimony objected to; and that some of the facts attempted to be shown, contradicted the plaintiff's petition. The objections made by the defendant's counsel were sustained by the Judge, *a quo*, and the plaintiff took a bill of exceptions.

The question of admissibility of the evidence objected to, may be divided into two branches: 1. As to those parts of the testimony going to show that *the defendant had not furnished provisions for the overseer; that the agent told the latter he could go to the witness' mother's or to Turner's for his meals; and that there was no bedding on the place at the time for him to sleep on;* and all such other facts, from which, within the knowledge and consent of the agent who had employed him, he was necessitated or authorized to absent himself occasionally from the place, &c.

2. As to those parts of the testimony introduced to establish that the plaintiff, being in the employ of Turner until the 6th of January, he could not regularly attend to the defendant's place until the said 6th of January.

I. We think the Judge, *a quo*, erred in rejecting the evidence on this branch of the question. The issue set up by the defendant was, that the plaintiff had neglected his duties, and had violated his contract; and this issue was opposed to his demand as the ground of complaint for which he had been discharged. According to our Code of Practice, no replication is admitted in the pleadings of a suit, (Code of Pract. art. 329,) and all new facts al-

leged in the defendant's answer are to be considered as denied by the plaintiff. Here, the defendant's allegations in his answer were intended to destroy the plaintiff's action, by showing that his discharge was founded upon a serious ground of complaint; and we are not ready to say, that the latter was precluded from proving facts going to justify his conduct, and to establish either that it was authorized by the agent of his employer, or that it proceeded from circumstances over which he had no control, and which necessitated him, to a certain extent, to neglect his duties. The contract had been made during the defendant's absence, by a man fully authorized to act for him; the plantation on which the services of the plaintiff had been required, was newly purchased; and if it be true, that the plaintiff absented himself from the place, under the instructions of the defendant's agent, and for purposes of necessity, this might perhaps so weaken the testimony adduced by his adversary, as to induce the jury to believe that he was dismissed without sufficient cause. Be this as it may, we think that, under the circumstances of the case, so far as they are above referred to, the plaintiff ought to have the benefit of this evidence, and that the inferior Judge should have permitted it to go to the jury. It is clear that the plaintiff, who could not foresee the nature of the defence set up against his claim, was not bound to allege those facts in his petition, as they were intended to be used to rebut the defendant's allegations, aud to justify his conduct in the performance of his duties.

II. The testimony rejected under this branch of the question was inadmissible, as it contradicted, to a certain extent, the allegations of the petition. The plaintiff states therein, that *he was engaged in his capacity of overseer, to oversee for the defendant for one year, to commence the* 1*st of January*, 1843, *and terminate on the last day of said year;* and further, that *he did, on the* 1*st day of January*, 1843, *enter upon the said plantation, and upon the performance of his duty in his said capacity of overseer, &c.* Under such allegations it seems clear, that he cannot be allowed to show that, although he was engaged by the agent from the 1st of January, it was understood between them that he was not to take the full charge of the slaves until the 6th. The contract declared upon, was to commence its operation on the first of January, and not on the 6th; if it was subject to any

condition or modification, it was the duty of the plaintiff to allege it; and, as the case stands, we think this evidence was properly rejected.

With this view of the question of admissibility of the evidence, the case must be sent back to be tried *de novo*, before another jury, so as to give to the plaintiff the benefit of the evidence which was improperly rejected below; and we think justice requires it also, on the ground, that the jury seems to have overlooked the plea of tender filed by the defendant, which amounts to an admission, that the plaintiff is entitled to recover at least forty-five dollars, alleged to have been tendered to him in full payment of his services. Code of Pract. art. 404.

With regard to the second bill of exceptions taken by the plaintiff, in relation to the manner in which the cause was argued before the jury, there is no necessity of our expressing any opinion upon it, as the case is to be tried *de novo*.

It is, therefore, ordered and decreed, that the judgment appealed from be avoided and reversed, and that this case be remanded to the lower court for a new trial, with instructions to the Judge, *a quo*, to admit the plaintiff's evidence to the extent above recognized. The costs in this court to be borne by the defendant and appellee.

Muse, for the appellant.

Ratliff, for the defendant.

Gordian A. Smith *v.* Charles McMicken.

A mandate, in general terms, confers only a power of administration. To alienate property, or to exercise any other act of ownership, it must be express and special. C. C. 2965, 2966.

A transfer of a judgment belonging to a partnership in a state of liquidation, made by an agent authorized to settle its affairs, but not expressly empowered to sell or transfer such property, must be declared void, unless it be shown that the transfer, being for the settlement, or payment of a partnership debt, was for the benefit of the partnership, and necessary to its liquidation, and that due notice thereof was given to the judgment-debtor.

Where an agent has acted without authority, a subsequent ratification by the principal will not render the act valid from its date as to third persons.

APPEAL from the District Court of West Feliciana, *Johnson*, J.

SIMON, J. The facts of this case are these: It appears that, in December, 1839, Peyroux, Arcueil & Co., having sued Charles C. S. Farrar and his wife, Mary A. Farrar, for the recovery of a certain sum of money, judgments were confessed by each of the defendants respectively in favor of the plaintiffs, in the following manner; to wit: the husband confessed judgment for the sum of $8031 40, with interest, and the wife confessed judgment for the sum of $8402 13, also with interest; whereupon regular judgments were rendered and signed accordingly.

On the 31st of August, 1843, Peyroux, Arcueil & Co., being yet the owners of the aforesaid judgments, executed an act of pledge by notarial act, in favor of the Consolidated Association and of the Citizens Bank of Louisiana, creditors of their firm, in a certain amount therein stated, in and by which they stipulated a transfer to the said banks, *à titre de gage et de nantissement*, of the judgment by them heretofore obtained against Charles C. S. Farrar for the sum of $8031 40, with interest, taking charge and promising to take all necessary steps to recover and collect the amount of said judgment, at their own expense, for the benefit of said banks, to whom the proceeds thereof were to be paid. The judgment against Mary A. Farrar is not mentioned in the act of pledge.

On the 5th of January, 1844, a power of attorney was executed by the partners of the house of Peyroux, Arcueil & Co., then in liquidation, to their co-partner, L. R. Arcueil, authorizing him *to manage and transact all their affairs, business and concerns of whatsoever nature and kind, without exception or reserve whatsoever;* to open their letters of correspondence addressed to the firm; to make and endorse promissory notes; to make checks and draw money out of banks; to deposit drafts and bills, &c.; *to sell or transfer all or any shares of the capital stock of any bank;* to pledge and pawn them, &c.; and giving him all such other detailed powers as were deemed necessary for the liquidation of the firm, without, however, *expressly* and *specially* giving him any authority to sell or transfer any of the claims, credits, or assets of said firm to any person; but authorizing him merely to ask demand, recover and receive, all such sums as

might be due to the firm, by virtue of whatever right or means to them appertaining, and to adjust and settle all accounts, &c., and to do and perform all acts necessary for the affairs and concerns of the firm in liquidation.

On the 26th of March, 1844, Arcueil, by an act under private signature, and acting for himself, and as the agent of his firm, under the said power of attorney, executed a transfer or assignment of the two judgments heretofore obtained against C. C. S. Farrar and his wife, to William D. Boyle. No consideration is expressed in the act, but it is therein recited, that "*the consideration of this transfer is expressed more fully in an act passed this day*, (26th of March, 1844,) *before Amedée Ducatel, notary public of this city, to which Hypolite Gally and James B. Hullin, myself, and William D. Boyle are parties.*" This last act, however, was not produced in evidence in this cause.

On the 4th of April, 1844, William D. Boyle, executed a transfer of the said judgments to the plaintiff in this suit, in consideration of which the transferree assumed the payment of certain notes given by the transferror and endorsed by other persons, payable in five annual settlements from date, for a sum left in blank, referring to a notarial act passed in New Orleans on the 25th of March preceding, to the Citizens Bank and the Consolidated Association. This assignmentwas duly notified to the debtors, on the 13th of July, 1844.

It further appears, that a suit having been instituted, in April, 1844, by the defendant, McMicken, against Peyroux, Arcueil & Co., for a large sum of money, judgment was rendered against the latter, in May following, by virtue of which an execution, issued on the 2d of July, was levied on the 5th, on the judgments against Farrar and wife, which levy was renewed on the 5th of August, by direction of the plaintiff's attorneys; and notices thereof were duly given by the Sheriff, on the same and following days, as other notices had also been previously given to the parties therein interested, in consequence of the previous seizure.

On the 7th of September, 1844, the present suit was instituted by injunction, which was obtained on the allegations of the plaintiff, Gordian A. Smith, that he was the owner of the judgments

rendered in favor of Peyroux, Arcueil & Co., against C. C. S. Farrar and his wife, by virtue of the transfers and assignments above referred to; that those judgments had been previously conveyed by act of pledge to the Citizens' Bank and the Consolidated Association, whereof due notice was given to Farrar and wife, and a copy of the same furnished to them; that due notice was also given to the said Farrar and wife, of the transfer made by Arcueil to William D. Boyle, and of that of the latter to the petitioner; that the firm of Peyroux, Arcueil & Co. had no interest whatever in the said judgments at the time of the seizure thereof, and that he, the plaintiff, is in danger of being illegally deprived of his rights over the same, &c.

The sale of the judgments seized was arrested by the issuing of the writ of injunction; and the defendant, McMicken, filed his answer, first pleading the general issue and requiring strict proof of the plaintiff's allegations; he further denied the validity of the transfer of the judgments; alleged that the pretended transfer made to William D. Boyle was fraudulent and collusive; and prayed, that the injunction might be dissolved, and the plaintiff condemned to pay interest and damages, &c.

Judgment was rendered below in favor of the plaintiff, perpetuating his injunction; and the defendant, after an unsuccessful attempt to obtain a new trial, took this appeal.

The first question to which our attention is called, under the state of facts above exposed, is, whether the transferror, Arcueil, acting for the firm of which he was a member, and which was in a state of liquidation, was sufficiently authorized by his power of attorney to transfer to others, the debts, rights and credits, or the general assets belonging to the firm? If he was, could he do so for any other purpose but for that of bringing the partnership to its final liquidation? And if he was not, would not the transfer by him made to Boyle be null and void, unless it be shown that it was made for a good and valuable consideration, in relation to the liquidation of the firm then under his charge?

It is perfectly clear that, without inquiring into the question of notice, which is only to be examined in case we come to the conclusion that the transfer was a sufficiently authorized and legal one from its origin, the right of the plaintiff to claim the

benefit of it, although due notice thereof should have been given would be defeated, if the person who made it had no authority to execute it, or if, whether authorized or not, it is not established that its execution was within the object for which the transferror was appointed, to wit: to liquidate the affairs of the firm. Now, the power of attorney under which the transfer or assignment of the judgments, rendered in favor of the partnership against C. C. S. Farrar and his wife, was made to William D. Boyle, as the agent of the plaintiff, though general in its terms in its beginning and close, details the special powers which the transferror's co-partners thought proper to give him in bringing the firm to its liquidation; they are limited to certain acts which he is authorized to perform, among which is that of *selling or transferring all and any shares of the capital stock* of any bank; but no authority was given to him to alienate the assets of the firm then in liquidation, and so declared to be in the act of procuration, or to transfer to others any of those assets. It is a clear principle of law, on the subject of agency, that a mandate conceived in general terms, confers only a power of administration; and that to make any act of alienation, or any act of ownership, the power must be express; (Civ. Code, arts. 2965, 2966. Story on Agency, chap. 6, § 71;) and as no such power is expressly included in the procuration among those which are therein detailed, it follows, that the transfer under consideration would be a mere nullity, or an act not binding upon the partnership, unless proof being furnished that it was executed for the settlement, payment, or satisfaction of one of the partnership debts, the consideration thereof should be shown to have been beneficial to the firm, and received for the purpose of facilitating its liquidation. Here, it is true, the transferree was charged to liquidate the affairs of the firm, and, as such, he must necessarily be able to exercise the powers which the partners intended to give him to attain their object; but such powers are not fixed by law, and their limits ought, therefore, to be regulated according to the expressions more or less extended in the acts by which they (*les liquidateurs*) have been appointed. See Merlin, Rep. de Jurisp., *verbo*, Société, sect. 8, § 4, 5, 6. If the act, however, was beneficial to the firm, and necessary for its liquidation, it should per-

haps be sanctioned, as if done by the concurrence of all the interested partners; but the fact must be proved, and hence, the question occurs here, has the consideration of the transfer relied on been sufficiently and satisfactorily established?

On this point it is first necessary to remark, that the defendant in his answer has alleged, that said transfer was fraudulent and collusive. As a creditor of the firm, entitled to the benefit of his seizure, he had a right to attack the consideration of the act relied on to defeat it, and to require proof of such consideration. 2 La. 492. The judgments assigned belonged to the firm; it is a well recognized rule that partnership effects are responsible for partnership debts; (3 La. 494;) and it is clear, that the levy made here to satisfy a debt of the firm, should have its full effect on the judgments seized, unless it be shown, that the same judgments had previously been duly and legally transferred in discharge of the liabilities of the same partnership, and that due notice of the assignment had also been given to the debtors thereof previous to the levy.

We have already seen, that the act of pledge executed by the firm in favor of the Citizens' Bank and the Consolidated Association, only includes the judgment obtained against one of the debtors, C. C. S. Farrar. It is silent as to the judgment against his wife, which is not therein mentioned; and so far, said act of pledge does not agree with the subsequent transfers, and was perhaps insufficient for the purposes for which it is now used. But the transfer to Boyle, embracing the two judgments, does not show the consideration for which it was executed; it merely refers to another act of the same day, to which certain other persons were parties, and yet the latter act was not produced in evidence! In the transfer from Boyle to Smith, for whom it appears Boyle had acted in this transaction, a consideration is expressed, to wit, the assumption of the payment of certain notes to the two banks, but the sum is left *in blank*, and the act therein referred to as having been executed on the 25th of March, was not produced in evidence! Thus, although the Citizens' Bank and the Consolidated Association, creditors of the firm under the pledge, appear to have had some interest in the transfers to Boyle and Smith, nothing shows the consideration which was paid to them

by the transferrees; and the consequence perhaps should be that, having failed to do so when it was in his power to have procured the evidence of the fact, if any such exist, the plaintiff should be nonsuited and his injunction dissolved, for want of sufficient evidence of his right; but as he might perhaps be entitled to institute another suit, and sue out a new injunction, we see no reason why, being the appellee, he should not be allowed an opportunity to produce his evidence in this suit, if it exists, and to establish the consideration of the transfers by him relied on; and we think that, under the circumstances of this case, we may fairly use our discretion in sending the case back to the court, *a qua*, for a new trial, under the principles above established, (Code of Pract. art. 906,) and that justice requires it.

The record, however, contains an act of ratification of the transfer made by Arcueil to Boyle on the 26th of March, 1844, which act was executed by the transferror's partners before a notary public, on the 6th of May, 1845; but said act, passed since the institution of this suit, does not show the consideration required; and as it is without proof of such consideration, we are not prepared to say that it should have such retroactive effect as to cure the defects of the original transaction, and affect the rights of a third person, acquired previous to its execution; and we think that, under the principles recognized in the case of *Grove* v. *Harvey et al.*, ante, p. 221, such ratification should have no such effect.

With regard to the question of notice so much debated in the argument, we consider it unnecessary to express now any opinion upon it; so far it is unimportant, as the plaintiff's right, having originated from a person who was not at the date of the transfer, sufficiently or expressly authorized to make it for his firm, it could not avail him, unless proof be adduced that it was made for a valuable consideration, and exclusively in relation to, and for the benefit of the liquidation of the affairs of the partnership to which the judgments assigned formerly belonged, and with which the transferror had been charged.

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed, that the injunction be provisionally maintained, and that this case be remanded to the

lower court for a new trial, to be there acted on according to law, the costs of this appeal to be borne by the plaintiff and appellee.

Lyons, for the plaintiff.

Perin, *Phillips* and *Muse*, for the appellant.

ELIZABETH B. CALMES and others, Heirs of Sarah Calmes, *v.* JAMES J. CARRUTH and another.

By a will executed in the State of South Carolina, a testatrix declared as follows: "I give to my daughter S. S. C., one-fifth of all my estate, both real and personal, during her natural life, and afterwards to her children, the heirs of her body, forever." The children were in being at the time of the devise. In an action by the heirs of the daughter, claiming certain slaves who belonged to the testatrix: *Held*, that this was a donation of the slaves to the daughter for her natural life, and afterwards to her children, the heirs of her body, forever.

APPEAL from the District Court of St. Helena, *Jones*, J. The defendant Carruth, appealed from a judgment rendered in favor of the plaintiffs, declaring them entitled to certain slaves sued for, and allowing them $1296, as damages against him individually. The judgment was in favor of the other defendant.

Sheafe and *Merrick*, for the plaintiffs. The rule in *Shelley's case*, does not apply to wills. Fonblanque on Equity, 62, and notes. 4 Vesey, 227. Croke Jas. 590. *Noyes* v. *Richardson*, 2 Mass. 63. The word *children*, is a word of purchase. 2 Atkyns, 220. 3 Mass. 360. Kent's Comm. lect. 59, s. 4. *Doe* v. *Laming*, 2 Burrows, 1100. *Read* v. *Snell*, 2 Atkyns, 64. *Champion* v. *Preaux*, 1 Atkyns, 472.

Baylies, for the appellants. Under the bequest in the will of Mrs. Braselman of one-fifth part of all her estate, both real and personal, to S. S. Calmes, during her natural life, and afterwards to her children, the heirs of her body, forever, the slaves in dispute became the absolute property of S. S. Calmes. See the rule in *Shelley's case*, and the commentary of Kent. 4 Kent's Comm. 214, 215. Under the English law, the words which would create an estate tail as to freeholds, give the absolute property as to chattels. 2 Kent's Comm. 354. 4 Ibid. 227-229. *Polk* v.

Fario, 9 Yerger, 209. 1 Bay, 453. 2 Ibid. 471. 1 Peere Williams, 143, 144.

BULLARD, J. The plaintiffs claim, as heirs of their mother, of the syndic of the creditors of their father, William Calmes, certain slaves which they assert were bequeathed to her by Drusilla Braselman, in the State of South Carolina. They allege, that the testatrix in her lifetime, lent to their mother, as well as to her other children, a certain number of slaves which were afterwards given by will, and that a part of the slaves in question were received in that way, and with that understanding; and, that after her death their mother, one of the heirs and legatees, retained them as a part of her portion.

The defendants answer, that the slaves were legally sequestered; that they became the property of the creditors of William Calmes, by his surrender and its acceptance by the Judge; and they deny the allegations in the petition. In a supplemental answer they deny, that Drusilla Braselman was ever in possession or owner of any of the slaves except Coleman, but aver that they were the property of the insolvent, William Calmes.

It appears that Calmes had resided with his family in the State of Mississippi, and afterwards removed to, and resides in Louisiana.

The clause in the will of Drusilla Braselman, which contains the alleged bequest, is as follows: "I give and bequeath to my beloved daughter Sarah S. Calmes, wife of William Calmes, one-fifth part of all my estate, both real and personal, during her natural life, and afterwards to her children, the heirs of her body, forever."

Two questions are presented by this case: *First.* Whether under this clause in the will, Sarah S. Calmes took only a life estate, with remainder over to her children, who it appears were *in esse* at the opening of the will, or a fee simple according to the laws of South Carolina. In the latter case, they vested in the husband; in the former, they descended to the heirs of the legatee. *Secondly.* Whether, in point of fact, the slaves now claimed are the same thus intended to be bequeathed.

I. It is ingeniously argued by the counsel for the appellants, in an elaborate brief, that the rule in *Shelley's case* is applicable

to the devise contained in this will, to wit, that when the ancestor by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not a word of purchase.

The present is a devise of personal property to Mrs. Calmes, *during her natural life*, and afterwards to her *children*, the heirs of her body, *forever*. Now it is shown, that the children, who now claim were in being at the time of the devise; and, we think the use of the word *children*, though not specifically named, may well be considered as qualifying the expression which follows, to wit, the heirs of her body. In the case of *Christmas and wife* v. *Weston*, (not yet published,) where the remainder-men were named, and were *in esse*, we held, that the devise was limited to a life estate in the first donee, and that the remainder vested at the same time with the particular estate. The present case appears to us to come within the principle recognized in Kent's Commentaries, as applicable to a case in which the heirs are spoken of as *now living*, which would clearly indicate the intention of the donor to give only a life estate to the first devisee. 4 Kent, 221.

Such we think, would be the construction in South Carolina, according to the principles settled by the highest courts in that State. 1 Bay, 453–480. 2 Bay, 471. 2 Hill, 328–453. 1 McCord, 60. 1 Nott & McCord, 69.

II. The identity of the slaves is the next question. It appears, that only two slaves were received by Calmes, from the estate of Mrs. Braselman, to wit, Coleman and Ben. The others, it is alleged, were advanced or loaned by the testatrix to her daughter, and were, after her death, taken and considered as a part of her legacy. It is further conceded, that Calmes sold the slave Ben received from the estate, and with the proceeds of the sale, together with other moneys received by him from the estate of Mrs. Braselman, purchased Juliette, who has been recovered in this case. Such being the fact, it is obvious that the plaintiffs cannot recover Juliette. The title to her is in the father, although he appropriated perhaps the funds of the plaintiffs to purchase her. If she had died, it would have been at the risk of the father, who

owed them the value of the slave sold by him, and the money received for him from the estate.

The evidence as to the other slaves has been strenuously combatted, and the credibility of some of the witnesses attacked. This was left to the jury, and the verdict upon that part of the case, is not so unsupported by evidence as to enable us to set it aside as clearly erroneous.

It appears, that one of the negro children by the name of Joe, found by the jury to be property of the plaintiffs, was omitted in the judgment, and we have been urged to amend the judgment in that respect, and make it conform to the verdict.

The jury gave damages to the amount of $1296, against the defendant Carruth, *individually*. This is complained of as erroneous.

Same Case.—On a Re hearing.

A slave belonging to minors having been sold by their father, another slave was purchased with the proceeds. The father having made a surrender of his property, the plaintiffs, by their under-tutor, sued to recover the slave so purchased: *Held*, that the title of the slave, which vested in the insolvent, passed to his creditors: and that, admitting that minors, where their property has been illegally sold, or where a purchase has been made with their funds, can claim either the money or the property, yet they can make this election only after coming of age, such election being equivalent to an alienation of their estate or to a purchase of property.

Defendant, in a proceeding instituted in his own name, having caused certain slaves belonging to plaintiffs to be sequestered as the property of his debtor, an insolvent, subsequently qualified as syndic of the creditors of the latter, and in that capacity proceeded to advertise the slaves for sale. In an action by plaintiffs to arrest the sale, and for damages for the illegal sequestration: *Held*, that damages were properly allowed against the defendant individually.

Sheafe, for the plaintiffs. The court in the opinion pronounced in this case, did not advert to the fact, that the sequestration which is the foundation of this action, was obtained by Carruth as a creditor, and not as syndic of the insolvent. The action is against Carruth individually. The petition states, by way of narration, and to identify the negroes, that they had been adver-

tized for sale by him as syndic. Carruth cannot shield himself from personal responsibility, by alleging that he acted as syndic. 2 La. 201, 350. 6 La. 449. 2 Robinson, 346.

It is well settled in courts of equity, that where property has been purchased by a guardian with the funds of the ward, the latter may elect to take the thing purchased, or sue for the money used. So, where a trustee invests trust property or its proceeds in any other property, the *cestui que trust* has the option of taking the property so purchased, or of holding the trustee personally liable. *Oliver* v. *Pratt*, 3 Howard's Sup. Ct. Reports, 405.

Merrick, on the same side. The minors have the right to claim the money, or the property purchased. 2 Equity Digest, 474, *et seq.*, Title, *Resulting Trusts*. 1 Johnson's Ch. Rep. 450. 2 Washington C. C. R. 441. 4 Kent's Comm. 305–6.

Baylies, for the appellants.

Morphy, J. On a re-examination of the pleadings and evidence in this case we are of opinion, that the claim for damages against the defendant Carruth individually, was properly sustained by the verdict and judgment below. The sequestration of the slaves belonging to the plaintiffs, was sued out by the defendant as a creditor in his individual name, some time before the appointment of a syndic to the estate of William Calmes. The proceeding was instituted under the insolvent law of 1817, which, without requiring bond, as in other cases of sequestration, gives this harsh remedy on the simple oath of a creditor, that he has strong reasons to fear, that the debtor may avail himself of the stay of proceedings, to keep his property from his creditors. B. & C.'s Dig. 488, § 9. About three months afterwards, the defendant was appointed syndic and proceeded to advertise the slaves seized for sale as syndic, when the plaintiffs brought this action for the double purpose of arresting the sale, and of recovering damages against Carruth, for having illegally seized and detained their property. The petition states, that the slaves were seized at the instance of James J. Carruth, and although in speaking of the negroes, he is said to have advertised them for sale, as syndic, the claim for damages is distinctly set up against him in his private capacity. Admitting that Carruth was quali-

fied to act as syndic, which is strenuously denied by the plaintiffs, on the ground, that he never gave any bond as such, nor was ever dispensed from giving one by the creditors, it is believed to be well settled, that no administrator can perpetrate acts to the injury of others, and shelter himself from personal liability under his representative capacity, especially, where, as in this case, such acts were committed previous to his appointment. 2 La. 202. 6 La. 451. 2 Rob. 346. The defendant when appointed syndic, could have brought a petitory action; and if he had feared the removal of the property, he might have had it sequestered, upon giving adequate security to protect the rights of the plaintiffs. Instead of doing so, he chose to resort to the step he took, in his own name as a creditor, when the slaves in question were not mentioned in the insolvent's schedule, and when he well knew that they belonged to the plaintiffs, whose attorney he had been in a suit against one N. Berthoud, wherein they were adjudged to be their property. Under the circumstances of this case as exhibited by the record, we cannot say that the jury allowed excessive damages.

As relates to the slave Juliette, admitting that the evidence fully makes out that she was purchased by William Calmes, with funds belonging to his minor children, and that minors, when their property has been illegally sold, or a purchase made with their funds, can claim either the money or the property, yet, we apprehend, that they can make this election only when they become of age, because it is equivalent to an alienation of their estate, or a purchase of property, which acts they cannot do without the authorization of a family meeting. In the present case, all the plaintiffs except one, are still minors, and they are incompetent to ratify or approve of the purchase of their father. The title to this slave which vested in him, has passed to his creditors by his surrender.

It is, therefore, adjudged and decreed, that the judgment of the District Court be avoided and reversed, and the verdict set aside, as to the *slave Juliette;* and it is further adjudged and decreed, that the plaintiffs recover and be quieted in their title to the following slaves, to wit: *Phillis, Jordon, Mariah,* and her two children, *Dublin* and *Eliza, Joe, Edinborough* and *Coleman;*

and that they have judgment against the succession of James J. Carruth, individually, for one thousand two hundred and ninety-six dollars, with costs in the District Court; reserving to them their right if any they have, to claim of the syndic, in due course of administration, the amount due by their father for money or property disposed of belonging to them; the costs of this appeal to be borne by the plaintiffs and appellees.

NORBERT MARIONNEAUX, Administrator of the Succession of Marie Jeanne Guyot, *v.* LOUIS MARIONNEAUX.

Though an heir who purchases property at a sale of the effects of the succession, is not obliged to pay the surplus of the price above the portion coming to him, until this portion is definitely fixed by a partition (C. C. 1265, 2603); yet where interest from a certain time was stipulated as a part of the price of the property purchased, he will be bound to pay it, though from a period anterior to the partition of the property. *Per Curiam:* Were it otherwise, the condition of the heirs who purchase would be more favorable than that of the rest.

APPEAL from the District Court of Iberville, *Deblieux*, J.

Labauve, for the plaintiff.

Edwards, for the appellant.

BULLARD, J. The plaintiff who sues as administrator of the estate of Marie Jeanne Guyot, deceased, wife of François Marionneaux, and of the community formerly existing between them, represents that, at the sale of the property belonging to the estate, Louis Marionneaux, one of the heirs, purchased property to a larger amount than his share of the estate, payable one-third in March, 1833, one-third in March, 1834, and one-third in March, 1835, which purchases were according to the terms of the sale to bear interest at ten per cent from the time the instalments fell due, until paid: that being one of the heirs, he was not bound to pay until the final liquidation of the estate, and then only the amount over and above his virile share. He represents, that the estate has been finally liquidated, so as to show the amount coming to each heir. It is alleged, that the defendant owes a balance of $539 72, with interest at ten per cent, from April, 1838, for which this suit is brought.

This balance is ascertained by adding the interest due on the purchase up to the payment of each instalment paid by him, or coming to him as heir, and carrying forward the balance, with interest to the next payment or compensation up to April, 1838, when the final balance was struck, and the interest according to the terms of the sale is then charged upon the balance against the defendant. The liquidation of the estate appears to have been made in 1840, showing the share coming to each, and how far the purchases made by any one of the heirs fell short of, or exceeded, his distributive share.

The defendant who was condemned to pay the above balance, with interest at ten per cent, has appealed from the judgment, and contends, in this court; 1st. That there was no liquidation, or partition of the estate, until the 28th of March, 1840. 2d. That the defendant, one of the heirs, was not obliged to pay for the property purchased by him until that time, according to articles 1265 and 2603, of the Civil Code. 3d. That he was not, consequently, in default, and owes no interest on the purchase money previously to March, 1840. 4th. That the whole amount claimed is for interest, the principal having been paid. 5th. That in the settlement and partition the defendant was not charged with interest, and that that settlement is conclusive.

The two first of these propositions are undeniable, but we think it does not follow as contended for, that the heir who purchases owes no interest, when such interest has been expressly stipulated, and consequently forms a part of the price. If it were otherwise, the condition of the heirs who purchase would be more favorable than that of those who do not purchase, because they would enjoy a part of the property, without any equivalent, until the final settlement among the heirs, and their portions would thus be unequal. If the partition were now to be made, the mass would be composed in part of the price for which the property sold, with the interest added up to this time, and the heir who purchased would owe the balance after deducting his portion. But it appears that in this case, the heirs received their portions by instalments corresponding with the terms of sale of property as above explained, and the interest is charged only on the balance due after the last instalment, in

1838. The settlement with the defendant was made as if he were a stranger to the estate, and had purchased property at the the sale, and had, from time to time, made partial payments. Such payments or compensations were imputed to the aggregate of capital and interest at each term of payment, in the usual manner of calculating interest, when partial payments have been made exceeding the amount of interest due.

The only doubt we have entertained in this case is, whether the administrator could maintain such an action, inasmuch as his duties consist mainly in liquidating the estate *quoad* the creditors. But as the plaintiff is himself one of the heirs, and no exception has been made on that ground, we have not thought it our duty to notice it. The judgment does not appear to us erroneous upon the merits.

Judgment affirmed.

MARY M'GARY *v.* THE PRESIDENT AND COUNCIL OF THE CITY OF LAFAYETTE.

APPEAL from the District Court of the First District, *Buchanan*, J.

Roselius, for the plaintiffs.

Michel and *Preston*, for the appellants.

BULLARD, J. This case grew out of that of *Hanson et al.* v. *The City Council of Lafayette*, decided in May, 1841, (18 La. 300,) in which we held, that the City Council had a right to construct a new levée in conformity to their ordinance, and to take sixty feet along the river from the break of the bank, and we dissolved an injunction provisionally granted on the petition of Hanson and others, among whom was the present plaintiff, to prevent the Council from taking a part of their lots.

After this judgment was rendered, to wit: in September, 1841, the present plaintiff presented her petition to the District Court, setting forth her ownership of one of the lots fronting on the new levée, and representing, that she had been formerly disturbed in her possession by the City Council, who asserted a right to make

a new levée and road over a portion of her property; that to prevent their doing so, she with others, had obtained an injunction, which was perpetuated in the District Court, but that on appeal it was dissolved and the suit dismissed; that according to the decision of the Supreme Court, the city authorities have a right to make the said levée according to their ordinance and a plan which they had adopted; that in obedience to that judgment, she had proceeded to demolish her building from that portion of the lot over which the new levée and road were to run; and that, in order that she might know precisely the line on which she was permitted to build, she applied to the surveyor of the city of Lafayette, who gave her the lines; that conforming to the lines thus given, and in obedience to the judgment of the Supreme Court, and in conformity to the plan with reference to which said decision was rendered, she removed and proceeded to erect her buildings on her property; that, having thus submitted to the decree of the court, and abandoned the property claimed by the Corporation, the President and Board of Council are still maliciously and illegally vexing, harassing and disturbing her in the enjoyment of her property; that their intention is, to expropriate and expel her from her property by a course of arbitrary and oppressive proceedings under color and cloak of law; and, that they are about to enter upon and demolish and destroy the buildings and improvements on her property; that, her property is not within the incorporated limits of the city of Lafayette; that the damages already sustained, and which she will sustain, in consequence of these illegal acts and doings, is upwards of ten thousand dollars. She concludes by praying for an injunction commanding the President of the Council and the Board itself, and all other persons, not to enter upon the land of the petitioner, nor to commit any act of trespass thereon, until the further order of the court, and that said injunction may be made perpetual, and that she may have judgment for her damages, and for general relief.

An injunction was accordingly issued, on the 14th of September, and was served on the same day upon Phelps, the President of the Council.

While the injunction was in full force, and while the plaintiff was proceeding with her building on the line indicated by the

City Surveyor, on the 16th and 17th of the month of September, the President repaired in person, with a number of persons under his command, and demolished a part of the wall which had been carried up one story high. The whole front wall was pulled down, and the side walls, about six or seven feet in depth back from the street.

On the 3d of November following, the defendants filed their answer containing a general denial. They aver, that they have done nothing, and do not intend to do anything, except what may be authorized by law and by said judgment, for the construction and preservation of the levée in front of the city of Lafayette.

The case was tried by a jury, who gave a verdict for ten thousand dollars damages against the city, and they appealed, after asking unsuccessfully for a new trial.

The record contains a certificate of Hugh Grant, the City Surveyor, dated August 3, 1841, which states, that he had determined and marked the front line of the plaintiff's property on the levée between Jackson and Philip streets, according to which, twenty-two feet three inches will be cut away from her frame dwelling on the side towards Jackson street, and twenty-one feet four inches on the side next to Philip street.

There is another certificate in the record, dated the 3d of September, signed by Buisson, the former City Surveyor, and who had made the plan in the record in the case of *Hanson et al.* v. *The City of Lafayette.* He certifies, that he had determined the front line of the plaintiff's lot, in conformity to a plan of the new levée ordered by the City Council, which plan is now deposited in the Supreme Court, in the proceedings above referred to. That he found the line already determined and correctly marked by stakes, which he was told, were placed there on the 3d of August, by Grant, the City Surveyor, as appears by his certificate. He further certifies, that in his opinion, the lot is within the incorporated suburbs of the parish of Jefferson.

Both the surveyors were examined as witnesses on the trial of the cause. Buisson testified, that he was the City Surveyor until July, 1841, and when the plan of the new levée was made, and that he was on the jury which determined the lines of the new

levée. He was applied to by the plaintiff for her lines in conformity to the plan for the location of the new levée. He was applied to before the decree of the Supreme Court was rendered. He delivered to plaintiff his certificate, which is in evidence. The plaintiff called on him to examine the lines according to the certificate of Grant, and he found, upon examination, that the lines were in conformity to the plan in the Supreme Court. The line of the projected levée took about twenty feet of the plaintiff's lot; and this levée was to serve the double purpose of a road and levée. That the projected levée is marked on the plan A, in red lines, and was all that was claimed by the city of Lafayette at the time. He knows, that after the lines were given by him and by Grant, the plaintiff commenced very near the line, but not on it. The building was of brick, and had been raised to the second story, the beams having been placed on. He was present when the President of the Council, and persons under his command, on the 16th and 17th of September, demolished the brick building. The wooden building had been taken away as far as it was required to be. He says, that the space between the foot of the new levée and low water mark was, on an average, thirty feet, and the distance from McGary's old house to high water mark was thirty-five feet, and to low water mark fifty-three feet, and that the new brick building is about twenty-nine feet back of the old one, and consequently sixty-four feet from where the natural break of the bank was, prior to the construction of the new levée; that according to the decision of the jury, the line of the levée was to be as straight as practicable, before each square from Philip to Josephine street; that the line between those streets has been put a little further back than was required by the plan.

Grant, the successor of Buisson, testified, that soon after his appointment, he was called on for lines of property on the levée; that he went to the Supreme Court and got the plans, and afterwards he learned that the court had decided that they were to have sixty feet from the break of the bank, wherever it should be, in each square, in as straight a line as possible, and this makes the difference between the two surveys; that no more than sixty feet, and that barely, has been taken opposite to McGary's property from the break of the bank; that the defendants have taken

down a part of the plaintiff's house, and there is not more than sixty feet between the front as taken down, and the break of the bank; that the certificate which he gave was given in conformity with the plan in the Supreme Court, and the line which he gave afterwards was because he had to deviate from the first line, because he could not get the sixty feet without doing so, and the same thing has been done all along the front. He saw nothing in the decretal part of the decision of the Supreme Court to guide him in running the line for the new levée; that he was guided by *the decree bodily;* that he interpreted the opinion of the Supreme Court as allowing sixty feet from the break of the bank, before every property, whether it was given in Buisson's plan or not; and, by so doing, he moved back the line in some instances on an average, some seven feet.

The principal question which the case presents upon the merits, independently of the fact, that the vio ent proceedings of the city authorities were in defiance of the injunction existing at the time, is brought to our attention by a bill of exceptions taken by the defendants to the charge of the Judge. He told the jury, that the proper interpretation of the judgment of the Supreme Court, in the case of *Hanson et al.* v. *The City of Lafayette*, was, that the defendants should be allowed to proceed with the demolition of all buildings existing on the space reserved by them for the use of the public, according to a plan made by B. Buisson, City Surveyor, in said suit; that the said judgment gave sixty feet for the use of the public, according to the said plan, and not otherwise; and that, if the defendants took more ground than was allowed by said plan, they were responsible in damages.

With a view of ascertaining the correctness of this charge of the District Judge, we have looked into the pleadings and decision of the court, in the case alluded to, and we find that the plan of Buisson was not contested by either party. It was with reference to it, that the jury proceeded in laying out the levée; it was with reference to it, as the basis of the proceedings of the City Council, that the injunction was taken in the first instance in that case. All parties appear to have acquiesced in the fact, that it correctly represented the localities. The President of the Council gave his notices to remove obstructions and buildings on

the line of the levée ordained by the Council in front of and through their property, *according to the plan made by the City Surveyor;* and the whole litigation turned upon the question whether the line marked out, was such as the law authorized. The City Surveyor was ordered to show the parties the lines when requested; and the President and Surveyor, were authorized to remove obstructions and incumbrances, always with reference to the plan, and it was, when proceeding to perform their duty, that they were stopped by the injunction in that case. The decree was simply that the injunction should be dissolved; but that decree necessarily authorized the city authorities to proceed in making the levée according to the plan of Buisson. The plaintiff, after demolishing her wooden building according to the lines given by Buisson and Grant, which were ascertained by reference to the plan of Buisson in the record, and after laying the foundation of her brick building according to the same lines, apprehensive of further disturbance, sought the protection of the law, and a restraint upon the operations of the defendants, until her rights could be verified by the court. But the defendants chose to take summary justice into their own hands; to set at defiance the authority of the court, and to proceed to demolish by force, the plaintiff's building. The court, in our opinion, did not err in their construction of the decree of this court. The plan of Buisson was evidently considered as correct at the time, and representing the new projected levée as at sixty feet from the break of the bank of the river, although subsequently a slight change may have taken place, in consequence of the gradual encroachment of the river. Such a change did not authorize a deviation from the plan, by the sole authority of the City Council.

A motion for a new trial was made on the grounds, 1st, that the verdict was contrary to law; 2d, that the damages are excessive and entirely unsupported by evidence; 3d, that the charge of the Judge was contrary to law.

We have already expressed our opinion, that the Judge did not err in his charge to the jury, and that the verdict is well founded in law. It only remains to inquire whether the damages are excessive.

The damages are certainly high, but by what standard are we

to decide that they are excessive? The defendants are a political corporation, whose agents openly and wantonly defy the authority of a court of competent jurisdiction, interposing the shield of the law between the oppressors and their victim. The plaintiff took every legal precaution in her power to save her property from destruction, until the court could pronounce upon the new pretensions of the Corporation. If the injunction had been respected, and the case tried upon the question as to the true line, according to the judgment of this court in the case referred to, we should undoubtedly have perpetuated her injunction. The amount of the damages divided among all the citizens of that Corporation, is to each separately a trifle; and, it cannot be pretended, in a case like this, that the party aggrieved is entitled to a bare indemnity. A lesson may be given to those who invest with power, men who are regardless of law and of private rights. If we were to send the case back to a second jury, there is no reason to suppose, that they would be less alive to the unprovoked wrongs of a fellow citizen.

Same Case.—On a Re-hearing.

Plaintiff having commenced an action against a city corporation for damages for oppressive and illegal proceedings on the part of the President and Council, in which she alleged that the latter, though acting officially, were really actuated by private interest and malice, obtained an injunction restraining them from entering upon and committing any trespass on her property. Defendants disregarded the injunction, and demolished a portion of a building forming part of the property. The jury returned a verdict in favor of plaintiff for an amount greatly exceeding the actual damage to the property, and there was judgment accordingly. On appeal: *Held*, that the acts of the President and Council having been alleged to be wilful and malicious, plaintiff cannot recover vindictive damages against the corporation, but only an indemnity for the loss actually sustained by her.

Michel and *Preston*, for the appellants, contended, that the judgment should be reversed on the ground that the damages were excessive, as the whole amount of injury sustained, admitting the defendants to have acted illegally, could not exceed two or three hundred dollars.

Roselius, contra, urged, that the judgment should be maintained. The damages were properly allowed. In an action against a wrong-doer for aggravated injuries, the amount allowed as damages should not be restricted to the actual loss. In the case of *Carlin* v. *Stewart*, 2 La. 76, the court said: "In actions for damages the jury are the legitimate judges of the *quantum*, and the court will not disturb their verdict." This doctrine has been recognized in every State of the Union. "Where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury, and not the opinion of the court, is to govern; unless the damages are so excessive as to warrant the belief, that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case." *Wooster* v. *Canal Bridge*, 16 Pick. 541. *Perry* v. *Goodwin*, 6 Mass. 498, *et seq.* *Smith* v. *Lush*, 4 Bibb, 502. "In trespass *quare clausum fregit*, where malice and vexatious and incidental wrongs were proved, the jury may give any amount of damages not exceeding that laid in the declaration, unless so excessive as to be obviously oppressive, or as to evince corruption or vindictive passion." *Major* v. *Pulliam*, 3 Dana, 584.

Simon, J. We cheerfully assented to the grant of a re-hearing in this cause, regretting infinitely our concurrence in the judgment; and we greatly lament the necessity we are in, of dissenting from the opinion of our colleague Judge Bullard, on the rehearing.

It appears to us that the former judgment of the court, if persisted in, would violate two very important legal principles. The plaintiff seeks to obtain from the inhabitants of the city of Lafayette who are bound to pay taxes, damages for the destruction of her house by the Mayor, at the head of a gang of laborers hired for that purpose, in violation and disregard of the authority of a court from which she had obtained an injunction. It is not alleged that the Mayor acted in obedience to a resolution of the Council, but, on the contrary, his malicious motives and intention are averred. The allegations of the petition, which preceded the issuing of the writ of injunction which was subsequently disregarded and violated by the Mayor, are, "that the President and

Board of Council of the city of Lafayette, are *maliciously* and illegally vexing, harrassing and disturbing the petitioner in the occupation and enjoyment of her property; that *their intention and object is to expropriate and expel the petitioner* from her property, *by a course of arbitrary, oppressive and illegal proceedings, under the color and cloak of law;* and that, although the individuals composing said Council act in the premises in their official capacity, *yet they are in reality actuated by motives of private interest and feelings of malevolence towards the petitioner, &c.*" Thus, it is obvious, from the very averments upon which this action is based, that this is an attempt to throw upon the whole Corporation of the city of Lafayette, or rather upon the tax paying citizens thereof, the consequences of the alleged malicious, wilful and personal acts of its agents.

The master is certainly liable to repair the injury which results from the inexperience or negligence of the servant, in the execution of the duties in which he employs him; but not for the malicious acts of the servant, even in the execution of the orders of the master; for these, the servant alone is liable. See the case of *Ware* v. *The Barataria Canal Company*, 15 La. 170, and the case of *Gaillardet* v. *Desmares*, 18 La. 490, in which this doctrine is fully recognized, and in which latter case, we said: "When the acts of an agent which do injury to others are wilful and deliberate, he must answer for his own misbehavior." The plaintiff, therefore, ought to have proven that the Mayor acted in the execution of the duties of his office, without malice, for he cannot be supposed to have been employed or directed to vent his revenge or malice against the plaintiff. Any act proceeding from malice or revenge must be viewed as his own, and his employers are not bound to repair the injury resulting therefrom.

It is true, the answer alleges, that "the defendants have done nothing, and intend doing nothing, except what may be authorized by law and by the judgment of this court," and hence, it has been argued, that the Corporation, instead of disavowing the acts of its agents, has thought proper to justify them: but, although the defendants represent the Corporation, their defence cannot change the grounds upon which this action is founded; it is set up by the very persons whose acts are complained of as mali-

cious, and who are represented as having been actuated by motives of private interest and feelings of malevolence; and we cannot consider it in any other light but as an attempt to justify their said acts, without any direct bearing upon the extent of the liability of their employers, whose legal responsibility cannot undergo any change or modification without their express consent. It does not seem to us, that the plea that the defendants' acts were authorized by law, can have the effect of throwing upon the Corporation a liability which is not recognized by law, or of permitting the plaintiff to exercise her rights against it, to a greater extent than that provided for by the Legislature.

Those who violate the laws of their country, disregard the authority of courts of justice, and wantonly inflict injuries, certainly become thereby obnoxious to vindictive damages. These, however, can never be allowed against the innocent. Those which the plaintiff has recovered in the present case, admitting that she was entitled to recover any from the defendants, being evidently vindictive, cannot, in our opinion, be sanctioned by this court, as they are to be borne by widows, orphans, aged men and women, and strangers, who, admitting that they must repair the injury inflicted by the Mayor on the plaintiff, cannot be bound beyond that amount, which will be sufficient for her indemnification. This amount is susceptible of being easily and correctly ascertained. The costs attending the replacing of the building in its original condition, and the sum which will amply compensate the loss of the use of the building, from the moment of its destruction until a new one is completed, are matters of very easy calculation. Damages in a case like this, differ widely from those in an action of slander or crim. con., and the very testimony of the only witness who testified below on the value of the damages sustained, shows it. It is true, that he states that, considering the trouble, vexation, inconvenience and expense which the plaintiff has suffered, he would not be in her place for less than $10,000; but he also values the loss of the eight feet of ground at $2000, and the walls taken down at $300 or $400. It seems to us so evident, that the sum granted by the jury exceeds immensely the proper measure of damages, perhaps by

threefold, that we feel no hesitation in remanding the case for a new trial, in order that the plaintiff may, if she can, introduce evidence tending to establish the liability of the defendants, and the real amount of the injury she has sustained. Such being the opinion of the majority of the court;

It is, therefore, ordered and decreed, that the judgment of the District Court be annulled and reversed; and that this case be remanded to the court, *a qua*, for a new trial according to law; the plaintiff and appellee paying the costs of this appeal.*

Bullard, J., dissenting. My opinion is, that the judgment first pronounced should remain undisturbed.

We all agree, I believe, that the merits of the case are clearly with the plaintiff, and that she is entitled to some damages. The only difficulty is as to the *quantum*, or, in other words, whether the damages given by the jury, and sanctioned by the court below, are excessive.

After the plaintiff's house had been demolished, the Corporation, by their attorney, justified the act of their Chief Magistrate. They answered, that they had done nothing, and intended to do nothing, except what may be authorized by law, and by the judgment, for the construction and preservation of the levée in front of the city of Lafayette. The city thus made the act their own, and should not now be listened to, when they urge that they are not responsible for the unauthorized and vindictive conduct of their agents. Those agents were acting within the sphere of their duties, and their conduct is approved by the Corporation.

As the present senior Judge said, in delivering the opinion of this court in the case of *Loney* v. *High*, 13 La. 274, which was also for damages done to property, "there is in such cases, no certain criterion of damages." Indeed, it seems well settled at this day, that in actions sounding in damages for torts, where the amount cannot be ascertained by computation, verdicts will

* *Roselius*, for the plaintiff, prayed for another hearing in this case; but the application was rejected, on the ground that one re-hearing had already been allowed.

not be set aside, unless the amount of the damages is manifestly and palpably so enormous, as to strike the mind at once, as the result of passion or prejudice on the part of the jury. In the case of *Mathews* v. *West*, which was for trespass committed by forcibly taking and carrying away a *load of peaches* from the land of the plaintiff, of which she was in quiet possession, the jury gave $200 damages. A new trial was refused, because the act was committed "in despite of the feelings of the plaintiff, and in opposition to her authority. In a case of complicated injury of this kind," said the court, "the rule adopted by the jury in estimating the damages, is not only correct and legal, but redounds to their credit, as it evinces a feeling on the part of the jury, friendly to the good order and well being of society, and hostile to acts of violence and force." 2 Nott & M'Cord, 415. In *Merest* v. *Harvey*, which was an action of trespass, it appeared that the defendant, who had been notified not to sport on the plaintiff's land, declared with an oath that he would, and accordingly fired several times upon the plaintiff's land at birds, (which the plaintiff found,) and used very intemperate language. The jury gave £500 damages, and the court refused to set aside the verdict. Chief Justice Gibbs said: "I wish to know, in a case where a man disregards every principle which actuates the conduct of a gentleman, what is to restrain him except large damages;" and he adds, "I do not know upon what principle we can grant a rule in this case, unless we were to lay it down, that the jury are not justified in giving more than the absolute pecuniary damages which the plaintiff may sustain." One of the other Judges said: "I remember a case where a jury gave £500 damages for merely knocking a man's hat off, and the court refused a new trial." 5 Taunton, 442.

In the celebrated case of the King's messengers executing and endeavoring to justify under a general warrant issued by the Secretary of State, the doctrine was fully gone into. In *Hinkle* v. *Money*, the plaintiff was a journeyman printer, and arbitrarily arrested upon suspicion of having printed the North Britain, and detained six hours, but was very civilly used; the jury gave a verdict of £300, and the court refused to set it aside as excessive. 2 Wilson, 205. In the case of *Beardmore* v. *Carrington*, which

was more aggravated, the plaintiff being an attorney, and his house having been entered, and his papers and books examined, and finally himself imprisoned under a similar illegal warrant, the verdict was for £1000, and the court refused to interfere, and said: "We are called upon, on our oaths, to say, whether these are excessive damages or not, and ought to have clear evidence before us, before we can say they are excessive." The court adds: "We desire to be understood, that this court does not say, or lay down any rule, that there can never happen a case of such excessive damages in tort where the court may not grant a new trial, but in that case the damages must be monstrous and enormous indeed, and such as all mankind must be ready to exclaim against at first blush." 2 Wilson, 244. So, in the noted case of the Governor of Minorca, where the verdict was for £3000, the same doctrine was maintained, and it was said; "the jury, not the court, are to estimate the adequate satisfaction."

Cases of the same class are innumerable in the English Reports. On one occasion the Court of King's Bench said, they dared not set aside the verdict of the jury. A British court does not stop to estimate the value of a few birds killed, or of the grass trodden down, as the measure of damages which a jury is bound to follow; but from motives of public policy, and for the adequate protection of private property and personal rights, sanctions exemplary damages in cases in themselves trivial, and where little real injury has been sustained. Graham on New Trials, *passim*. 4 Durnford & East, 651. 1 Durnford & East, 277. 3 Wilson, 62. 2 Wilson, 160. 4 Sergeant & Rawle, 27.

Let me advert to the admitted facts in the case now before us, and see whether this court ought to send the case before another jury, on the ground of excessive damages.

The plaintiff had submitted to the judgment of the Supreme Court, and a frame house which encroached upon the street or levée according to that decision, was demolished or removed. Anxious to build so as not again to be troubled, she applied to two different surveyors, who had been successively in the employment of the city, to point out to her the lines according to the plan which had been sanctioned by the Supreme Court. She com-

menced building a brick house upon her lot, conforming to the lines thus pointed out to her; but fearing that the city authorities would still molest her, she applied to the District Court, and obtained an injunction to restrain their proceedings until the court could pronounce upon the rights of the parties. The injunction was duly served on the President of the Council, on the 15th of September, and on the two following days the same President went in person, with a number of laborers, and assisted in demolishing the front wall of the new house, which had already been raised as high as the second story. The side walls were also pulled down for seven or eight feet back from the front. This act was done by the President of the Council in virtue of his general power to abate nuisances, and consequently he was acting within the scope of his authority, and the Corporation is responsible for his conduct. It was done in defiance of judicial authority, to which the plaintiff had appealed for protection.

I cannot think we ought to take into consideration in what way the taxable inhabitants of the city of Lafayette are to be affected by this verdict, and that *they* are innocent of any wrong towards the plaintiff. We must look upon the Corporation as a legal entity, quite distinct from the persons who compose it. If the president and directors of a bank, by negligence or otherwise, render the *bank* liable for damages, we never consider how the interests of the stockholders are to be affected. That is a question between them and their mandataries.

Was the jury bound to make an exact calculation of the pecuniary loss actually sustained by the plaintiff in the destruction of brick and mortar, the amount of rent required to furnish her a temporary shelter, and the loss incurred by failure of her building contract? Is nothing due for her trouble and vexation, and the expense of employing counsel, which she necessarily incurred? Did the court, in the case above referred to of *Mathews* v. *West*, consider that the jury was bound to count the peaches taken away, and estimate their value by the dozen or the bushel, as the criterion of damages? No. In my opinion, exemplary damages were properly given, and, although high, I know not upon what principle they can be declared excessive, according to all the precedents in the books. I venerate those precedents in

this class of actions, and I regard an honest jury as the only safe barrier against the abuse of petty authority. Let us not weaken those defences which our ancestors threw around them, for the protection of private property and personal rights. For my part, I rejoice that the last act of my official life consists principally in leaving on the records of this court, in which I have labored for more than eleven years, this expression of my admiration of those great principles, my abhorrence of oppression in all its forms, and of my conviction, that it is mainly by means of fearless and independent juries awarding exemplary damages, that the rights of the citizen can be adequately protected, and violence and outrage suppressed.

In the case of *Hermogene Brown* v. *Valery Gaudet*, from the District Court of St. James, the judgment below was affirmed on appeal, in New Orleans, with damages, during the period embraced by this volume.

INDEX.

ABSENTEE.

1. An action may be maintained against an absentee, though not personally cited, and though no property of his have been attached, where a curator, *ad hoc*, has been appointed to represent him. *Copley* v. *Berry*, 79.
2. Where an absentee against whom an action had been commenced by attachment excepted to the attachment, but, on the exception being overruled, pleaded to the merits, he will be entitled, if the exception was erroneously overruled, to require that the action be dismissed. The benefit of his exception is not waived by his answer made under the order of the court. *Grove* v. *Harvey—Re-hearing*, 226.
3. An absentee against whom an action has been commenced by attachment, must be cited by affixing copies of the attachment and citation on the door of the parish church, or of the room in which the court sits, as directed by art. 254, of the Code of Practice. Service of citation on the attorney appointed to represent the absentee, is insufficient. Citation being the basis of every action, (C. P. 206,) and the formalities prescribed by art. 254, of the Code of Practice, being in lieu of it, their omission will be fatal. *Krœutler* v. *Bank of United States—Re-hearing*, 461.

See APPEAL, 7, 10. ATTACHMENT, 12. CURATOR AD HOC.

ACCESSION.

1. Where a jury, in ascertaining the amount to which a defendant is entitled for improvements made by him which have enhanced the value of the land recovered by plaintiff, charge the latter with the buildings erected on the land, at a high estimate, as necessarily enhancing the value of the soil, without affording him an opportunity of availing himself of the choice given by art. 500 of the Civil Code, the verdict will be set aside. *Kellam* v. *Rippey*, 44.
2. A possessor in bad faith cannot claim any thing for improvements made by him on the premises, where their value does not exceed that of the fruits and revenues received by him. Such a possessor has no claim to the fruits and revenues. C. C. 3416. *Williams* v. *Booker—Re-hearing*, 256.

See HUSBAND AND WIFE, 13.

ADMINISTRATOR.

See SUCCESSIONS, IV.

AGENCY.

1. Where one styling himself the agent of another takes the oath and signs the bond necessary to obtain an attachment, without sufficient authority from his principal, the attachment must be dissolved, though the acts of the pretended agent be subsequently ratified by the principal. The authority of the agent must exist at the time of the attachment. C. P. 245.

Grove v. *Harvey*, 221.

2. A power to sign an attachment bond must be special. C. C. 2966. *Ib.*

3. Where a creditor receives from his debtor a draft on a third person, as collateral security, the proceeds to be applied to the payment of his debt, he acts, so long as he holds the draft, as the agent of his debtor, and is responsible not only for unfaithfulness, but for faults or neglect; (C. C. 2971, 2972:) and where, through the neglect of the creditor, in giving incorrect instructions to the notary by whom the draft was protested, or in not furnishing him with the means of obtaining correct information as to the residence of the endorser, the latter, the only solvent party to the bill, is discharged, the debtor will be entitled to credit for the amount of the bill.

Cammack v. *Priestly*, 423.

4. In questions as to the individual liability of persons acting avowedly as agents, the principal inquiry must be to whom was the credit given according to the understanding of both parties; and this is to be ascertained by an examination of the contract itself, the circumstances under which it was made, and the manner in which it had been executed and appears to have been understood, by the parties. *Campbell* v. *Nicholson*, 428.

5. In an action on a bill accepted by an agent, the evidence of witnesses who testify that they had seen the written authority by which defendants empowered the agent to accept bills for them, will be admissible, where the power itself is not in plaintiff's possession, nor under his control.

Kræutler v. *Bank of United States*, 456.

6. An authority to sell real property and to apply the proceeds in a particular way, unexecuted at the time of a *cessio bonorum* by the principal, is revoked thereby. *Barrett* v. *His Creditors*, 474.

7. To entitle a plaintiff to recover on a contract executed by a person acting as an agent, the authority of the agent must be proved.

Carpenter v. *Beatty*, 540.

8. A mandate, in general terms, confers only a power of administration. To alienate property, or to exercise any other act of ownership, it must be express and special. C. C. 2965, 2966. *Smith* v. *McMicken*, 653.

9. A transfer of a judgment belonging to a partnership in a state of liquidation, made by an agent authorized to settle its affairs, but not expressly empowered to sell or transfer such property, must be declared void, unless it be shown that the transfer, being for the settlement, or payment of a part-

nership debt, was for the benefit of the partnership, and necessary to its liquidation, and that due notice thereof was given to the judgment-debtor. *Ib.*

10. Where an agent has acted without authority, a subsequent ratification by the principal will not render the act valid from its date as to third persons. *Ib.*

11. Plaintiff having commenced an action against a city corporation for damages for oppressive and illegal proceedings on the part of the President and Council, in which she alleged that the latter, though acting officially, were really actuated by private interest and malice, obtained an injunction restraining them from entering upon and committing any trespass on her property. Defendants disregarded the injunction, and demolished a portion of a building forming part of the property. The jury returned a verdict in favor of plaintiff for an amount greatly exceeding the actual damage to the property, and there was judgment accordingly. On appeal: *Held*, that the acts of the President and Council having been alleged to be wilful and malicious, plaintiff cannot recover vindictive damages against the corporation, but only an indemnity for the loss actually sustained by her.

McGary v. *City of Lafayette—Re-hearing*, 674.

ALIMONY.

Defendant, the natural tutor of his minor children, having rendered an account of his administration of the estate of his deceased wife, with whom there existed a community of *acquests*, charged himself with the revenues of the minors derived from property inherited from their mother and administered by him as tutor, but omitted to credit himself with the expenditures incurred subsequently to the dissolution of the community for their maintenance and education. It was proved, that the community and the surviving husband were insolvent, and that the latter had no property at the death of the wife. The property of the minors was sufficient to provide for their support and education. On an opposition by plaintiffs, who had obtained a judgment against defendant, their former tutor, for a balance due to them: *Held*, that defendant, as natural tutor of his children, was bound to account for the revenues of their property, after deducting the expenses of their support and education, according to their means and condition in life; that the alimony due from ascendants to descendants being due only in proportion to the wants of the one and the circumstances of the other, none was due by defendant to his children, (C. C. 245, 246, 247;) and that the children having an income sufficient for their support and education, plaintiffs, who were interested in the settlement of the tutorship, had a right to require that the support and education of the minors should be paid for out of the revenues of their property. *Mercier* v. *Canonge*, 385.

AMENDMENT.

See PLEADING, 10, 11.

ANSWER.

See PLEADING, 20.

APPEAL.

I. *From what Judgments an Appeal will lie.*
II. *Petition of Appeal.*
III. *When Appeal may be taken.*
IV. *Parties to Appeal.*
V. *Appeal Bond, and Order fixing its Amount.*
VI. *Effect of Appeal in Suspending Execution.*
VII. *Record of Appeal.*
VIII. *Assignment of Error, and Matters urged for the first time after Appeal.*
IX. *Judgment on Appeal.*

I. *From what Judgments an Appeal will lie.*

1. The amount claimed, and not that allowed by the judgment of the court of the first instance, determines the right to appeal.

Succession of Stafford, 178.

2. An appeal may be claimed as a matter of right, from a judgment homologating a final and notarial act of partition of property, formerly held in community between the applicant and his deceased wife, where the amount is sufficient to give jurisdiction to the Supreme Court. It is no ground for refusing the appeal to allege, that the act of partition has been made in conformity to previous decrees of the Supreme Court, between the same parties, having the force of *res judicata*, and that it is but the carrying into execution of such previous decrees. C. P. 565. *Per Curiam:* Whether anything has been done by the notary, or by the judge in homologating the report, in violation of the legal rights of the parties as settled by previous decrees, are questions which can only be examined on the appeal of the party who thinks that he has been aggrieved.

State v. *Judge of Probates of West Baton Rouge*, 315.

3. The syndics of an insolvent having presented a *tableau* of distribution, certain items for syndics' commissions and sums paid to the attorney of absent heirs and for clerk hire, were rejected, either wholly or in part. One of the syndics prayed for a suspensive appeal, which was refused on the ground that his separate interest was not sufficient to entitle him to an appeal. On a rule to show cause why a *mandamus* should not be issued, the judge, *a quo*, showed that since the appeal was refused to the first applicant, a petition for an appeal from the same judgment had been presented by the two syndics and allowed generally. *Held*, that two appeals cannot be allowed to the same person from the same judgment, and that the rule must be discharged. *State* v. *Judge of District Court of First District*, 320.

4. An ap peal will lie in favor of the heirs from a judgment on an opposition made

by them to a *tableau* of distribution presented by the curator of the succession of the deceased, though none of the claims so opposed and allowed against the estate exceed three hundred dollars, where their whole amount exceeds that sum. *State* v. *Judge of Probates of New Orleans*, 415.

5. No appeal will lie from a judgment dissolving an injunction obtained to restrain the levying of a tax, where the opposite party is required, as the condition of its dissolution, to give security for the reimbursement of any sum which may be paid by plaintiffs, in case there should be a judgment in their favor. The judgment is interlocutory, and does not work irreparable injury.
State v. *First Municipality of New Orleans*, 488.

II. *Petition of Appeal.*

6. Where the petition for an appeal, drawn up in the names both of the defendant and a garnishee, was not signed by the counsel of the former, through inadvertence, but the bond, executed in pursuance of the order of the judge allowing the appeal, was executed in the name of both appellants, though not signed by the defendant, it is sufficient. The omission of the attorney to sign the petition is not such a fault of the appellant as will justify the dismissal of the appeal. The omission may be supplied under section 19 of the act of 20th March, 1839.
Erwin v. *Commercial and Railroad Bank*, 227.

7. Where the atorney appointed to represent absent defendants applies, as such attorney, for an appeal from a judgment against them, alleging in his petition that there is error to their prejudice in the judgment, and praying, on their behalf, for the appeal, and the appeal is allowed to them by the order of the judge, the appeal must be considered as taken by the defendants.
Kræutler v. *Bank of United States*, 456.

III. *When Appeal may be taken.*

8. A suspensive appeal may be taken within ten days from the day on which judgment was signed, exclusive of Sundays and days of public rest; and in computing the time, neither the day on which the judgment, was signed, nor that on which the appeal is to be taken, is included. C. P. 318.
Garland v. *Holmes*, 421.

9. Where the last day allowed for obtaining an appeal falls on a day of public rest, the whole of the next judicial day is allowed. *Ib.*

10. One who resides out of the State may appeal from a judgment rendered against him at any time within two years from the day on which final judgment was rendered (C. P. 593); and where plaintiffs allege in their petition and affidavit for an attachment that defendants are non-residents, it is sufficient evidence of such non-residence.
Kræutler v. *Bank of United States*, 456.

IV. *Parties to Appeal.*

11. Where the plaintiff in a petitory action, appeals from a judgment rendered in favor of the defendant, third persons called in warranty, must be cited as

appellees, or the appeal will be dismissed. *Per Curiam:* One who asks relief at our hands, must bring before us all the parties interested in maintaining the judgment which he seeks to have amended or reversed.

Oliver v. *Williams*, 180.

12. All the parties interested that a judgment shall remain undisturbed, must be made parties to any appeal taken from it, and their names must be included in the appeal bond, or the appeal will be dismissed; and this rule applies to the intervening parties interested in the judgment.

Swearingen v. *McDaniel*, 203.

13. In a suit for freedom instituted against the curator of a succession and the tutrix of the heirs, judgment was rendered in favor of the plaintiff, and the tutrix alone appealed, without making the curator a party: *Held*, that the demand of the petition was indivisible, and the judgment a joint one; that it cannot stand as to the curator and be reversed as to the heirs; that no appeal having been taken by the curator within the time prescribed by law, the judgment had become final as to the succession; that the heirs, being minors, could accept the succession only with the benefit of inventory, and, as beneficiary heirs, were entitled only to the residue of the estate after the payment of the debts, (C. C. 1051); that this residuary interest gave them no authority to represent the succession. and that their separate appeal could not prevent the judgment from becoming final against the estate; and that as the succession, in consequence of the judgment having become final, is concluded thereby, the appellants are also concluded. Appeal dismissed.

Andat v. *Gilly*, 323.

14. Where, pending an action instituted by the natural tutor of certain minors to recover an amount due to them, the tutor dies, another tutor must be appointed, in whose name the proceedings may be carried on. The executor of the deceased tutor cannot represent the minors, nor receive, nor administer their property. In such a case, where the tutor dies pending an appeal, the action will be continued until the minors are properly represented, or come of age. *Mitchell* v. *Cooley*, 370.

V. *Appeal Bond, and Order fixing its Amount.*

15. Where the judge, in granting an appeal, whether suspensive or devolutive, omits to state at the foot of the petition praying for it, the amount of the security to be given by the appellant, the appeal must be dismissed. C. P. 574, 575, 578. *State* v. *Commercial and Railroad Bank*, 187.

See 12 *Supra.*

VI. *Effect of Appeal in Suspending Execution.*

16. Where a *fi. fa.* has been issued against a defendant before notice of judgment served on him as required by law, he may require that the *fi. fa.* be quashed, and a suspensive appeal allowed. But where he contents himself with taking a devolutive appeal only, he cannot afterwards complain.

Hatch v. *English*, 135.

VII. *Record of Appeal.*

17. Where the amount in controversy cannot be ascertained from the record, the appeal must be dismissed. *Succession of Tompkins*, 110.

18. Where testimony taken on the trial below was not reduced to writing, and there is no statement of facts nor assignment of error, the appeal must be dismissed. *Barbour* v. *Smith*, 421.

VIII. *Assignment of Error, and matters urged for the first time after Appeal.*

19. Where an appellant urges as a ground for reversing a judgment, that the attorney by whom the case was conducted on his behalf in the court below had no authority to represent him, the allegation must be supported by affidavit, or it will not be noticed. *Fisher* v. *Moore*, 95.

20. In an assignment of errors, the error must be plainly and fully stated; and nothing can be assigned as error which depends on the facts of the case, or which might have been cured by legal evidence on the trial.
Kraeutler v. *Bank of United States*, 456.

21. Where the record contains all the evidence introduced on the trial, or a statement of facts on which the appellant relies either wholly or in part, the appeal cannot be dismissed for want of a formal assignment of errors. C. P. 897. *Ibid—Re-hearing*, 461.

22. Informalities in the citation of an absentee, against whom suit has been commenced by attachment, cannot be waived by any act of the attorney appointed to represent him, as by filing an answer to the merits, without objecting to the citation, &c.; and such informalities may be taken advantage of, for the first time, on appeal. *Ibid.*

23. The exception of *res judicata* can be pleaded for the first time before the Supreme Court, only where the facts necessary to sustain it appear from the record. C. P. 902. *Carpenter* v. *Beatty*, 540.

IX. *Judgment on Appeal.*

24. Damages will not be allowed for a frivolous appeal, unless prayed for by the appellee. *Benton* v. *Roberts*, 112. *Johnson* v. *Bailey*, 177.

25. Where the evidence is contradictory, and its effect depends in a great degree upon the credibility of the witnesses, a jury are the best judges of the weight to which it is entitled; and their verdict will not be disturbed, unless manifestly wrong. *Edwards* v. *Burroughs*, 171.

26. The verdict of a jury must be set aside when evidently wrong.
Marigny v. *Union Bank of Louisiana*, 283.

ARREST.

Damages for an illegal arrest, may be recovered under art. 2994 of the Civil Code, which declares that every man shall be bound to repair any damage done by his fault to another. *Spofford* v. *Pemberton*, 162.

ASSIGNMENT.

Where a a creditor accepts from the assignee of the bank a certificate, recognizing him as a creditor for the amount of the certificate, and declaring him or his assigns entitled to the benefit of the assignment, and to a *pro rata* proportion of any dividends which may be declared, his transferree cannot dispute the validity of the assignment. *Per Curiam:* By surrendering to the assignees the original evidence of his claim, and accepting the certficate, the creditor acceded to the conditions of the assignment itself.

Lowry v. *Commercial and Railroad Bank*, 193.

ATTACHMENT.

1. On a motion to dissolve an attachment for insufficiency of the affidavit, the judge not having signed the certificate that the affidavit had been made before him, it appeared that the words, "Sworn and subscribed before me," were written across the affidavit in the hand-writing of the judge, but that they were not signed by him; that the order allowing the attachment recited that the judge had read the petition, affidavit, &c., and was written immediately before these words, on the same paper, and was signed by the judge; and that the unfinished certificate as to the oath and the order, bore the same date. *Held*, that the attachment should be maintained; that the judge acted on the affidavit as one sworn to before him; and in signing the order containing that expression, by the strongest implication, certified that it had been sworn to before him. *English* v. *Wall*, 132.

2. Where one styling himself the agent of another takes the oath and signs the bond necessary to obtain an attachment, without sufficient authority from his principal, the attachment must be dissolved, though the acts of the pretended agent be subsequently ratified by the principal. The authority of the agent must exist at the time of the attachment. C. P. 245.

Grove v. *Harvey*, 221.

3. A power to sign an attachment bond must be special, C. C. 2966. *Ib.*

4. Where an absentee against whom an action had been commenced by attachment excepted to the attachment, but on the exception being overruled, pleaded to the merits, he will be entitled, if the exception was erroneously overruled, to require that the action be dismissed. The benefit of his exception is not waived by his answer made under the order of the court.

Ib.—*Re-hearing*, 226.

5. In attachment cases all the forms must be strictly complied with, or the proceedings will be void.

Erwin v. *Commercial and Railroad Bank*, 227.

6. Plaintiff who had obtained an attachment on giving a bond as required by law represented that the attachment had not been served or levied according to law, and was therefore void, and prayed that another attachment might be issued, which was done, but no new bond was executed. The bond referred only to the first attachment. *Held*, that the liability of the surety in the bond related exclusively to the first attachment and bound him only for

any damage resulting from it; that the bond could not be revived without his consent; and that the second attachment must be dismissed. *Ib.*

7. An attachment bond must be for a sum exceeding by one-half the whole amount claimed, inclusive of the interest which had accrued up to the date of filing the petition. C. P. 245. *Ib.*

8. Where the proceeds of property sold by a factor had been transferred to a third person for a valuable consideration, and notice of the transfer given to the factor before the issuing of an attachment at the suit of a creditor of the original owner, the attachment must be set aside. It matters not how the factor was informed of the transfer, provided it be shown that he knew that his creditor was divested of all right to the debt so transferred, and that such knowledge was derived from the transferree or his agent.

Bank of St. Mary v. *Morton*, 409.

9. Where the original owner has lost all power over the property, and the title has legally vested in another, the creditors of the former cannot attach. *Ib.*

10. Garnishees in cases of attachment, and third persons to whom interrogatories are authorized to be propounded by the 13th section of the statute of 20th March, 1839, are parties to the controversy at least as between the plaintiff and themselves, and may be required to answer, in open court, any interrogatories propounded to them. *Petway* v. *Goodin*, 445.

11. An absentee against whom an action has been commenced by attachment, must be cited by affixing copies of the attachment and citation on the door of the parish church, or of the room in which the court sits, as directed by art. 254, of the Code of Practice. Service of citation on the attorney appointed to represent the absentee, is insufficient. Citation being the basis of every action, (C. P. 206,) and the formalities prescribed by art. 254, of the Code of Practice, being in lieu of it, their omission will be fatal.

Kraeutler v. *Bank of United States.—Re-hearing*, 461.

12. Informalities in the citation of an absentee, against whom suit has been commenced by attachment, cannot be waived by any act of the attorney appointed to represent him, as by filing an answer to the merits, without objecting to the citation, &c.; and such informalities may be taken advantage of, for the first time, on appeal. *Ib.*

13. A return by a marshal on an attachment, "that he had executed the writ by seizing in the hands of A. all sums of money, rights, credits, and property belonging to the defendant, to an amount sufficient to satisfy the debt," &c., is alone no evidence that any thing was actually seized.

Poole v. *Brooks*, 484.

ATTORNEY AT LAW.

1. Where an appellant urges as a ground for reversing a judgment, that the attorney by whom the case was conducted on his behalf in the court below had no authority to represent him, the allegation must be supported by affidavit, or it will not be noticed. *Fisher* v. *Moore*, 95.

2. The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the district court of the domicil of the accused; and there must be a trial by jury. Acts 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1.

Turner v. *Walsh*, 383.

3. In determining the compensation to be allowed to an attorney appointed to represent the absent heirs of a succession, the court should not be governed by the opinion of other members of the profession as to the amount. It should exercise its own judgment, and the allowance should be made with reference to the labor, skill, and care required, and to the value of the estate. *Succession of Mager*, 413.

4. An attorney appointed to represent the absent heirs of a succession, is incompetent to act as attorney in procuring the recognition of the heir. Such recognition must be sought contradictorily with him. *Ib.*

5. Informalities in the citation of an absentee, against whom suit has been commenced by attachment, cannot be waived by any act of the attorney appointed to represent him, as by filing an answer to the merits, without objecting to the citation, &c.; and such informalities may be taken advantage of, for the first time, on appeal.

Kraeutler v. *Bank of United States.—Re-hearing*, 461.

6. Defendants having retained plaintiff as their counsel, to defend them in certain actions, in which they had been cited as warrantors, executed a note in his favor for a sum stipulated as his fee. To an action on the note defendants pleaded that plaintiff never rendered the services, for the compensation of which the note was given. There was no evidence of any services rendered; but it was proved that the parties, who had cited the defendants as warrantors, had effected a compromise, by which the latter were discharged: *Held*, that plaintiff was entitled to recover, and that his inaction might have been the result of a conviction, that it would lead to a compromise, more advantageous to his clients, than any judgment he could hope to obtain. *Hennen* v. *Bourgeat*, 522.

AUDITOR OF ACCOUNTS.

1. Where accounts have been referred to auditors, the court may, on a motion to homologate the report, receive testimony and examine the auditors themselves, and correct any errors in the report, or order a new one, or a new examination of the accounts (C. P. 457); but it must proceed summarily. It cannot, without pronouncing on the report, submit the case to a jury. C. P. 457. *Flower* v. *Downs*, 101.

2. Where a party has moved for the homologation of the report of auditors after being amended in certain particulars, he will be thereby precluded from requiring any other amendments. *St. Romain* v. *Robeson*, 194.

BANK.

1. The seventh section of the statute of Mississippi, of 21 February, 1840, prohibiting the banks of that State from transferring, by endorsement or otherwise, any note, bill receivable, or other evidence of debt, and the second section of the statute of 22 February, 1840, requiring that they shall at all times receive their own notes at par in payment of any debts due them by bill or otherwise, are constitutional, and do not impair the obligation of any contract; and where a judgment obtained by a Mississippi bank has been seized by a creditor of the bank, the debtor is still entitled to discharge it in notes of the bank, at par. *Williams* v. *Planters' Bank*, 125.

2. Interrogatories propounded to a bank as a party to an action, should be answered by the president of the bank; answers by the cashier alone, are insufficient. *Commercial Bank of Natchez* v. *Guice*, 181.

3. The statute of Mississippi of 21 February, 1840, which prohibits (s. 7) the banks of that State from transferring, by endorsement or otherwise, any note, bill receivable, or other evidence of debt, renders any general assignment by a bank, so far as such *choses in action* are concerned, illegal. *Per Curiam:* The remedy would not have been co-extensive with the evil, if, while the assignment of a particular *chose in action* was forbidden, a bank should make a general assignment of all such property possessed by it.
Marshall v. *Grand Gulf Railroad and Banking Company*, 198.

4. The illegality of an assignment made by a bank in the State of Mississippi, in violation of the seventh section of the statute of 21 February, 1840, prohibiting the transfer of any note, bill, or other evidence of debt, may be set up by a creditor of the bank who has attached its property, where the assignment is pleaded as a means of defeating the attachment. The provision of that section, that any action on a bill, note, or other evidence of debt, so transferred, shall abate on the plea of the defendant, does not restrict to a debtor of the bank the right to plead the illegality of such a transfer. *Ib.*

5. Commissioners appointed under the act of 14 March, 1842, ch. 98, to liquidate a bank, may maintain an action against the late officers and directors for damages for maladministration of its affairs. Sects. 12, 24. *Per Curiam:* Any action against bank directors for maladministration may be maintained by their successors; and any action which the directors might have maintained, while the corporation was in existence, to increase the fund out of which the debts of the body corporate are to be paid, may be instituted by the commissioners after its dissolution.
French v. *Landis*, 633.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. *Transfer.*
II. *Accommodation Endorsers.*
III. *Presentment for Payment and Protest.*

IV. *Promise to Pay after Discharge.*
V. *Promise to Pay by Third Persons.*
VI. *Evidence in Actions on Bills and Notes.*
VII. *Prescription and other Defences to Actions on Bills and Notes.*

I. *Transfer.*

1. Parol proof that a promissory note payable to the order of the donor, and by him endorsed in blank, was delivered to plaintiff as a gift, is insufficient to enable her to hold it as a gratuitous donation *inter vivos*. Such a donation must be by an act before a notary, in the presence of two witnesses. C. C. 1523. *Morres* v. *Compton*, 76.

See 21 *infra*.

II. *Accommodation Endorsers.*

2. An accommodation endorser of a note is not a surety in the meaning of art. 3518 of the Civil Code, which declares, that a citation served on the principal debtor, or his acknowledgment, interrupts prescription as to the surety. *Per Curiam:* The suretyship between an accommodation endorser and the maker of a note, exists only as between themselves; as to the holder, their liability depends on the rules applicable to negotiable instruments in general. *Jacobs* v. *Williams*, 183.

III. *Presentment for Payment and Protest.*

3. Notice, orally delivered, to an endorser of a note on the day of its maturity, but after business hours, that the note would be protested on that day unless it were paid, or some arrangement made, is insufficient to bind the endorser. An endorser can only be made liable where the note has been duly protested for non-payment, after demand and presentation at the place where it was made payable, and written notice of the non-payment and protest. *Union Bank* v. *Fonteneau*, 120.
4. Notice of the non-payment and protest of a note, given to an endorser residing in the town in which the note was payable, two days after the protest, is insufficient. *Ib.*
5. The holder of a bill protested for non-payment, is not bound to send a notice directly to all the parties to it. If such notice be sent, it will enure to the benefit of any endorser who may pay the bill, in an action against previous endorsers, or the drawer. It is sufficient for the holder to give notice to his immediate endorser, leaving it to the latter to notify the next endorser, and so on to the drawer; one day being allowed to each party to notify his immediate endorser, or the drawer. The rule is the same where a note or bill is sent by the holder to his agent for collection. If the latter give timely notice of dishonor to his principal, it is sufficient; and a notice from the principal, seasonably sent, will suffice to charge any prior party. The

agent's knowledge of the endorser's residence, does not make it necessary for him to send a notice directly to the endorser.

Grand Gulf Railroad and Banking Company v. *Barnes*, 127.

6. A notice of protest sent to an endorser at the post office at which he usually received his letters and papers at the time of the protest, and which was in the parish in which he resided, is sufficient; though it be proved that there was another office in an adjoining parish nearer to his residence, at which the endorser, at a previous period, had been in the habit of receiving his letters and papers, there being no evidence to show that he continued to receive any letters or papers there at the date of the protest. *Ib.*

7. The drawer of a bill, on the face of which there was a waiver of acceptance, is not entitled to notice of its dishonor, and will not be discharged by its omission, where he had no funds in the hands of the drawee, but was to place the latter in funds to pay the bill at maturity, and it was not expected that the drawee, would pay without such deposit; but the bill must be presented for payment on the last day of grace, or he will be released.

English v. *Wall*, 132.

8. Notice of protest sent to an endorser by mail, must be addressed to him at his residence, and be directed to the post-office from which he is in the habit of receiving letters and papers, where that is the nearest to his residence.

Bell v. *Lawson*, 152.

9. Where an endorser receives his letters and papers from two post-offices, a notice of protest directed to either, will be sufficient.

New Orleans Canal and Banking Company v. *Briggs*, 175.

10. Notice to the drawer of the protest of a bill for non-payment, directed to him at a post-office not the nearest to his residence, without any proof that he was in the habit of receiving his letters and papers there, is insufficient.

New Orleans Savings Bank v. *Harper*, 231.

11. The drawer is not entitled to notice of non-payment by the acceptor, where the bill was accepted merely for the accommodation of the former. *Ib.*

IV. *Promise to pay after Discharge.*

12. A promise by the drawer to pay a bill, from which he has been released by illegalities in the notice of protest, will not be binding, unless it be proved that he was aware of his discharge at the time of the promise.

New Orleans Savings Bank v. *Harper*, 231.

V. *Promise to Pay by Third Persons.*

13. Where a person writes to his agent that "B. holds a note of F.'s endorsed by N.," and directs him to pay the note without interest, it amounts to a promise to pay the note; and if the holder accept the promise, it will be obligatory on the person by whom it was made. C. C. 1896.

Bell v. *Lawson*, 152.

14. A promise by a third person to pay a bill or note for the endorser, to be binding on the former, must be made with full knowledge by him of any want of due diligence on the part of the holder which may have exonerated

the endorser; but direct proof of such knowledge is not necessary. It may be inferred from the promise under the attending circumstances, as where the promise was to pay the principal due, without interest. In such a case it will be inferred that the circumstances discharging the endorser, were known; for, if the protest were regular, interest would run from its date. *Ib.*

VI. *Evidence in Actions on Bills and Notes.*

15. The certificate of the notary by whom a note was protested that demand of payment was made at the proper place, is *prima facie* evidence against the endorser, and sufficient, *per se*, until rebutted by direct proof.

Union Bank v. *Cushman*, 237.

16. The certificate of a notary that he presented a note, which was payable at the office of a parish judge, at the said office, to a person in the office, and demanded payment thereof, and was informed that there were no funds to pay it, is sufficient evidence of demand against the drawer of the note.

Dosson v. *Sanders*, 238.

17. Action by the holder against the maker of a note, endorsed by the payee in blank, and on which the latter had written an acknowledgment of the receipt of its value from the plaintiff, and at the same time warranted its payment to the plaintiff, or his assigns: *Held*, that judgment by default could not be confirmed against the defendants, without proof of the endorsement of the payee, and of his signature to the transfer written on the note. Proof of a plaintiff's demand is required in all cases when not admitted by the defendants. C. P. 312, 360. *Young* v. *Talbot*, 518.

VII. *Prescription and other Defences to Actions on Bills and Notes.*

18. Action against defendant personally for the amount of a promissory note, signed by him as executor, and endorsed by two other persons. It was proved that the note was given in part renewal of one made by defendant's testator, endorsed by the same persons, and which had been discounted for the deceased by plaintiffs; that the original note of the deceased was for a larger amount, which had been reduced in his lifetime by curtailments; and that, after his death, the debt was diminished by further curtailments, and the execution of new notes, signed by the defendant, as executor of the estate of deceased, or simply as executor, until reduced to the amount for which the note sued on was executed. *Held*, that the defendant is not liable personally; that the facts show that it was not originally contemplated by any of the parties that he should be so responsible; that the execution of the note sued on created no liability on the part of the estate of the deceased, nor even changed the nature of the original obligation, but was a mere acknowledgment of a debt which the executor was competent to make. *Bank of Louisiana* v. *Déjean*, 16.

19. The prescription of five years, established by art. 3505 of the Civil Code, does not apply to a promissory note not transferable by endorsement or delivery. Such a note is prescribed by ten years. C. C. 3508.

Whiting v. *Prentice*, 141. *Owen* v. *Holmes*, 148.

20. An acknowledgment of the debt by the maker of a note does not interrupt prescription as to the endorser. They are not debtors *in solido* in the meaning of arts. 2092, 3517 of the Civil Code, which declare that a suit brought against one of the debtors *in solido*, or his acknowledgment of the debt, interrupts prescription as to the rest. *Per Curiam:* The maker and endorser do not bind themselves at the same time, or by the same contract, but by different and successive contracts, without any privity or reciprocity. Debtors *in solido* are, among themselves, liable each only for his portion (C. C. 2099); if one pays the whole debt, he can claim from each of the rest only his portion; and if one be insolvent, his portion must be divided among the solvent obligors. C. C. 2100. *Aliter*, as to the maker and endorsers of a note or bill; each endorsement is a distinct contract; if payment be made by the maker, or first endorser, neither can claim anything from subsequent endorsers; while, if it be the last endorser who pays, he may claim the whole amount from any previous endorser or the maker; and each endorser has the same right against every previous endorser and the maker.
Jacobs v. *Williams*, 183.

21. The holder of a negotiable note given for the price of property fraudulently sold by a debtor after obtaining a respite, cannot recover on it, though taken before maturity, where the evidence shows that he was aware of the fraudulent character of the sale. *Pralon* v. *Aymard*, 486.

22. The fact, that some of the makers of a promissory note, who bound themselves jointly and severally, were unauthorized to contract, does not discharge the rest. *Per Curiam:* A co-debtor, *in solido*, cannot plead any exception merely personal to the other co-debtors. C. C. 2094.
Hennen v. *Bourgeat*, 522.

See 2 *supra*.

CITATION.

1. Rule on defendant to show cause why an execution should not be issued against her individually for a debt due by the succession of which she was curatrix. Defendant failed to appear. The rule was made absolute, and she appealed. The citation to answer the rule was served on a person stated in the return to be the attorney in fact of the curatrix. There was no allegation in the rule that the defendant was absent from the State; and the power only authorized the attorney to represent her in her capacity of curatrix. *Held*, that the rule must be discharged, for assuming that defendant was absent at the time of serving the citation, the power only authorized the attorney to represent her as curatrix, and the object of the rule was to render her personally liable. *Wilson* v. *Vincent*, 235.

2. An absentee against whom an action has been commenced by attachment, must be cited by affixing copies of the attachment and citation on the door of the parish church, or of the room in which the court sits, as directed by art. 254, of the Code of Practice. Service of citation on the attorney appointed to represent the absentee, is insufficient. Citation being the basis of

every action, (C. P. 206,) and the formalities prescribed by art. 254, of the Code of Practice, being in lieu of it, their omission will be fatal.

Kraeutler v. *Bank of United States.—Re-hearing*, 461.

3. Informalities in the citation of an absentee, against whom suit has been commenced by attachment, cannot be waived by any act of the attorney appointed to represent him, as by filing an answer to the merits, without objecting to the citation, &c.; and such informalities may be taken advantage of, for the first time, on appeal. *Ib.*

CODES, ARTICLES OF, CITED, EXPOUNDED, &c.

I. *Code of* 1808.
II. *Civil Code.*
III. *Code of Practice.*

I. *Code of* 1808.

Book I. tit. 7, art. 25. Illegitimate children. *Balot y Ripoll* v. *Morina*, 552.
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COMPENSATION.

1. The amount of a judgment rendered by a court of the first instance, cannot be pleaded in compensation in another action, where an appeal taken from the judgment is yet undetermined. *Kernion* v. *Hills*, 376.

2. When the holder of a protested bill becomes the purchaser of property belonging to the acceptor, sold at the suit of a third person, subject to certain mortgages, for a price exceeding the amount of the previous mortgages, the debts will extinguish each other by operation of law, to the amount of the smallest, by compensation. C. C. 2204. The amount due by the purchaser, after satisfying the previous mortgages, is sufficiently certain. *Id certum est quod certum reddi potest. Collier* v. *His Creditors*, 398.

3. The holder of a protested bill purchased property of his debtor, sold at the suit of a third person subject to a mortgage, the payment of which was assumed by the purchaser as a part of the price. The latter subsequently transferred the bill to a fourth, and after the transfer, the debt secured by mortgage was extinguished by prescription: *Held*, that the amount of the debt so extinguished not being due to the mortgagor until the note was prescribed, and the purchaser having previously transferred the note, no compensation could take place between the debt evidenced by the note, and that for the amount of the mortgage assumed by the purchaser. C. C. 2205. *Ib.*

4. In an action by an executor against the sureties of a former executor to recover money received by the latter belonging to the succession, defendants cannot plead in compensation a debt due by the deceased to their principal. The debt must be settled in the ordinary course of law, contradictorily with all the parties interested. *Fink* v. *Martin*, 416.

CONSTITUTION OF THE STATE.

See CONSTITUTION OF THE UNITED STATES, 2.

CONSTITUTION OF THE UNITED STATES.

1. The seventh section of the statute of Mississippi, of 21 February, 1840, prohibiting the banks of that State from transferring by endorsement or otherwise, any note, bill receivable, or other evidence of debt, and the second section of the statute of 22 February, 1840, requiring that they shall, at all times receive their own notes at par in payment of any debts due them by bill or otherwise, are constitutional, and do not impair the obligation of any contract; and where a judgment obtained by a Mississippi bank has been seized by a creditor of the bank, the debtor is still entitled to discharge it in notes of the bank, at par. *Williams* v. *Planters Bank*, 125.

2, The act of 26 March, 1842, section 9, imposing an annual tax of two hundred and fifty dollars on money and exchange brokers, is not inconsistent with the constitution of the State, nor of the United States.

State v. *Nathan*, 352.

3. The 4th section of the act of 26th March, 1842, chap. 154, imposing a tax of ten per cent on all sums, or on the value of all property received by any non-resident alien, as heir, donee or legatee, from any succession opened in this State, or on so much thereof as may be situated in this State, is not in-

consistent with sections 8, 10, of article 1 of the Constitution of the United States, nor with any treaty or act of Congress.

Succession of Mager, 581.

CONTRACTS.

1. Where a person writes to his agent that "B. holds a note of F.'s endorsed by N.," and directs him to pay the note without interest, it amounts to a promise to pay the note; and if the holder accept the promise, it will be obligatory on the person by whom it was made. C. C. 1896.

Bell v. *Lawson*, 152.

2. In the interpretation of contracts the common intent of the parties, rather than the literal sense of the terms, should be sought; and where the intent is doubtful, the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation. C. C. 1951. *Marcotte* v. *Coco*, 167.

3. Parol evidence is admissible to show in what manner a contract for the sale of lands has been executed by the parties, and how far the possession has conformed to the act of sale. *Ibid.*

4. Where a creditor accepts from the assignees of the bank a certificate, recognizing him as a creditor for the amount of the certificate, and declaring him or his assigns entitled to the benefit of the assignment, and to a *pro rata* proportion of any dividends which may be declared, his transferree cannot dispute the validity of the assignment. *Per Curiam:* By surrendering to the assignees the original evidence of his claim, and accepting the certificate, the creditor acceded to the conditions of the assignment itself.

Lowry v. *Commercial and Railroad Bank*, 193.

5. Though a direct action to annul a contract be prescribed, its nullity may be pleaded by the party against whom it is sought to be enforced, at any time, by way of exception.

Marshall v. *Grand Gulf Railroad and Banking Company*, 198.

6. Money placed in the hands of a cashier of a bank to be transmitted to a branch, having been lost through his negligence, to protect himself from suspicion he gave his notes for the amount, endorsed by a third person, the surety on the bond given by the cashier for the faithful discharge of his official duties. The notes having been paid by the endorser, in an action by the latter to recover the amount paid on the ground of error and illegality or want of consideration: *Held*, That the consideration for which the notes were given was not illegal; and that the obligation of the cashier to make good any loss occasioned by his neglect, if not a legal obligation, was, at least, a natural one, and sufficient to prevent the endorser from recovering back the amount paid by him. C. C. 2281, 2285.

Marigny v. *Union Bank of Louisiana*, 283.

7. A promise to pay pre-supposes a consideration. It is for the party seeking to avoid the promise to show that there was none. *Ibid.*

8. Where a promise has been made, a just cause will always be presumed.

It is for the party promising to exonerate himself, by showing that it was without any just or legal cause. *Brashear* v. *Hazard*, 328.

9. A promise by the owner of a building to pay an amount due by a former owner for gas, made in order to obtain gas for his own use, and in consequence of a threat, by the company having the exclusive privilege of vending gas, that unless the amount were paid, no gas should be supplied, is void. C. C. 1853. *Gas Light and Banking Company* v. *Paulding*, 378.

10. A debt due by a third person is a sufficient consideration for a promise to pay; but the promise must be unequivocally and freely made, and made to the creditor. C. C. 3004, 3008. *Ibid.*

11. In questions as to the individual liability of persons acting avowedly as agents, the principal inquiry must be to whom was the credit given according to the understanding of both parties; and this is to be ascertained by an examination of the contract itself, the circumstances under which it was made, and the manner in which it had been executed and appears to have been understood, by the parties. *Campbell* v. *Nicholson*, 428.

12. Defendants being authorized by their charter to construct a road on each side of a bayou, and to charge certain tolls thereon, contracted with plaintiffs for the construction of a road on one side, in consideration of conceding to them the tolls thereon for a certain number of years. Plaintiffs were to be at all the expense of the construction and repairs of the road, and, at the expiration of the time fixed on, it was to become the property of defendants. The contract was silent as to the right to make a road on the other side of the bayou. Defendants having constructed a road on the other side of the bayou, before the expiration of the time during which plaintiffs were to receive the tolls on the road constructed by them, an action was commenced by the latter for damages: *Held*, that to entitle plaintiffs to recover they must clearly establish a renunciation by the defendants of their right to construct a second road; and that it is not enough to make it probable that the right was intended to be renounced.

Allard v. *Orleans Navigation Company*, 469.

13. The fact, that some of the makers of a promissory note, who bound themselves jointly and severally, were unauthorized to contract, does not discharge the rest. *Per Curiam:* A co-debtor, *in solido*, cannot plead any exception merely personal to the other co-debtors. C. C. 2094.

Hennen v. *Bourgeat*, 522.

14. Two distinct actions having been commenced by different plaintiffs against the defendant, attachments were levied at the same time on the same property, which were released on the execution of a single bond for the two cases, conditioned that if said defendants shall satisfy such judgments as may be rendered against them in the suits pending, the said obligations shall be void, otherwise remain in full force, &c. The claim of each plaintiff exceeded the amount of the bond, which was silent as to their respective shares in it. On a rule by one of the plaintiffs against the sureties on the bond to show cause why they should not satisfy a judgment obtained by him, and exception by the sureties that plaintiff, being a joint obligee, could not re-

cover against them without joining his co-obligee ; *Held*, that the bond containing distinct obligations to perform different things in favor of different persons, each obligee has a distinct and separate remedy, (C. C. 2074, 2076) ; but that where one plaintiff proceeds against the sureties, before any decision on the claim of the other, he can recover only one-half of the amount of the bond, reserving his right to recover the balance in case the plaintiff in the other action shall be defeated. *Irish* v. *Wright*, 563.

See HUSBAND AND WIFE, III.

COSTS.

Action by plaintiff for the settlement of a particular partnership praying for a sequestration of the partnership property, the liquidation of the partnership affairs, a division of the profits, and the sale of the property. There was a judgment declaring plaintiff in debt to defendant in a certain sum, to be paid out of plaintiff's share of the proceeds of the sale of the partnership effects, which were ordered to be equally divided between the parties. *Held*, that costs are incidental to a judgment, and that plaintiff, having failed to recover, must pay all the costs of the proceedings. *St. Romain* v. *Robeson*, 194.

COURTS.

1. Courts of Probate are competent to decide on the title to real property, when the question arises, directly or collaterally, in a suit for partition. Act 27th March, 1843, ch. 71. *Mayo* v. *Stroud*, 105.

2. Courts of probate are without jurisdiction of an action against a curatrix to render her personally liable for the debts of the succession, for mal-administration ; or to determine whether real property, which she has not included in the inventory, but claims as her own, belongs to the succession, or not. *Per Curiam :* It is not enough to allege that a defendant is curatrix of an estate, to give jurisdiction to the probate court of a matter not in itself of probate jurisdiction. Even a suit on the bond of a curatrix against her and her sureties individually, must be brought before a court of ordinary jurisdiction, nor can a court of probate inquire directly into the title to real estate. *Hemken* v. *Ludewig*, 188.

3. A demand that an executrix be ordered to account and file a *tableau* of distribution, cannot be cumulated, in an action before a probate court, with a demand against the defendant to render her individually liable for mal-administration. The demands are contrary to each other, and cannot be prosecuted together ; and a probate court is without jurisdiction as to the latter. *Ibid.*

4. The executor of the will of one who was domiciliated and died in another State deriving his powers from a Probate Court of this State, administers only on the property of the deceased situated here ; and that part of the estate of the deceased only, is under the control of the courts of this State. *Succession of Packwood*, 334.

5. Where the value of property seized under a *fi. fa.* from a Parish Court,

exceeds the sum to which the jurisdiction of the court is limited, an injunction may be obtained, by one claiming to be the owner of the property, from a District Court. The circumstances of the case make it a necessary exception to the provisions of arts. 397, 617, 629 of the Code of Practice. *Chapelle* v. *Lemane*, 519.

6. A District Court cannot enjoin the execution of a judgment rendered by a Probate Court. *Nolan* v. *Babin*, 531.

7. District Courts have jurisdiction of actions against the curator of an interdicted person to recover a claim against the person interdicted.

Hyde v. *Erwin*, 536.

CURATOR AD HOC.

1. A curator, *ad hoc*, appointed to represent an absent defendant, has no right to appear for the defendant, until regularly cited.

Carpenter v. *Beatty*, 540.

2. A curator, *ad hoc*, cannot waive the production of any evidence necessary to establish the plaintiff's claim; nor can he consent to any judgment being rendered against the absentee, or waive any legal right of the party he is charged to defend. *Ibid.*

See ABSENTEE, 1, 3.

DAYS OF PUBLIC REST.

The first of January is a day of public rest in this State. Act 7th March, 1838, s. 5. *Garland* v. *Holmes*, 421.

DEFAULT, JUDGMENT BY.

See JUDGMENT BY DEFAULT.

DONATIONS INTER VIVOS.

1. Where the deceased, has left no legitimate children or descendants, but a legitimate brother and sister, and descendants from other legitimate brothers, his natural children can receive from him, by donation *inter vivos*, not more than one-fourth in value of his property. C. C. 1473.

Compton v. *Prescott*, 56.

2. Parol proof that a promissory note payable to the order of the donor, and by him endorsed in blank, was delivered to plaintiff as a gift, is insufficient to enable her to hold it as a gratuitous donation *inter vivos*. Such a donation must be by an act before a notary, in the presence of two witnesses. C. C. 1523. *Morres* v. *Compton*, 76.

DONATIONS MORTIS CAUSA.

I. *Execution and Proof of Testaments.*

II. *Power to Dispose, and Interpretation of Testaments.*

I. *Execution and Proof of Testaments.*

1. It is essential to the validity of a nuncupative will by public act that it be expressly stated in the instrument that it was read to the testatrix in the presence of the necessary witnesses. C. C. 1571, 1588. Thus where the will states; "*Que la dite comparante testatrice a dicté ses dernières volontés, en présence de* [mentioning three witnesses,] *tous trois de l'âge de majorité et domiciliés dans cette paroisse, écrit de suite par moi, le dit juge, sans interruption et sans divertir à d'autres actes. Alors j'ai lu le dit acte, à la dite testatrice; qui a déclareé qu'elle le comprenoit, et qu'elle l'approuvoit dans tout son contenu. Dont acte fait, &c.*"—it will be declared invalid as a nuncupative will by public act, reserving the right to those interested, of establishing its validity as a nuncupative testament by private act. C. C. 1583. *Succession of Sparks*, 35.

2. The fact that a nuncupative will, by public act, was read to the testatrix in the presence of the necessary witnesses, must appear from the instrument itself. The words in which the statement is made, are immaterial, provided they be such as to leave no doubt that the formality was complied with.

Ibid.—Re-hearing, 37.

3. The fact that a nuncupative testament by public act was executed by the testator, under a name which he had assumed for political reasons, and by which he had been known for many years, will not vitiate the will, where the circumstances of the case show, that the name was not used *in fraudem legis*, nor to defeat the rights of his legitimate heirs.

Balot y Ripoll v. *Morina*, 552.

4. The son-in-law of a legatee is competent as a witness to the will. The relations and connections of a legatee are not incompetent to prove a will. C. C. 1585. Arts. 2260, 2261 of the Civil Code do not apply to witnesses to a will. *Keller* v. *McCalop*, 639.

5. As a general rule, all persons are competent as witnesses to a will unless expressly excluded. *Ibid.*

6. It is no objection to a will by public act, that it was not executed at the office of the notary, nor that it was executed on a Sunday. *Ibid.*

7. Where a testament by public act recites, "that this last will was dictated by the testatrix to me, the said notary public, by whom it was written as dictated to me, and then read to the testatrix, who declared to have perfectly understood it and to persist therein, all of which was done in the presence of the said attending witnesses," it is sufficient proof that the will was read to the testatrix in the presence of the witnesses, that it was dictated by her at the time it purports to have been signed, that it was written as dictated, and that it was read to the testatrix by the notary. *Ibid.*

8. The formalities prescribed by art. 1571 of the Civil Code for the execution of nuncupative testaments by public act, must be fulfilled at one time, without interruption, and without turning aside to other acts; but it is not necessary that express mention should be made in the will that they have been

so fulfilled. It is for the party who attacks the will to show that they have not been so fulfilled. *Ibid.*

II. *Power to Dispose, and Interpretation of Testaments.*

9. Article 1474 of the Civil Code, which declares, that where the father disposes in favor of his natural children, of the portion which the law permits him so to dispose of, he shall dispose of the rest of his property, in favor of his legitimate relations, unless he bequeath it to some public institution, does not constitute his legitimate relations, his forced heirs for the rest of his estate; nor does it render void the disposition in favor of his natural children, though he make no disposition of the residue of his estate, or subsequently dispose of it, in favor of persons not his legitimate relations; such subsequent dispositions are absolutely null, and the remainder will go to his legal heirs. If he make any disposition of such remainder, it must be in favor of some public institution, or of his legitimate relations, but, where there are no forced heirs, he may bequeath it to such of them, one or more, as he may select.
Compton v. *Prescott*, 56.

10. A testator, without children or descendants, after several particular legacies, one of which was a legacy, under an universal title, of one-fourth of his whole property to his natural children, bequeathed all the remainder of the estate, which he then owned or might afterwards acquire, both real and personal, to four nieces, to be equally divided between them. The particular legacies, except one of a sum of money to another niece, either failed from the incapacity of the legatees, or were reduced. *Held*, that by leaving the remainder of his estate to be divided between his four nieces, the testator intended to give them only what might remain, after the payment of the previous particular legacies; that they are not universal legatees (C. C. 1599,) but legatees under a universal title (C. C. 1604): that not being bound by the will to discharge any of the particular legacies, they cannot benefit by their failure or reduction (C. C. 1697); and that the legacies which have failed, or the amounts by which they have been reduced, must be considered as portions of the estate remaining undisposed of, devolving under article 1702, upon the legal heirs. *Ibid.*

11. Art. 1478 of the Civil Code, which, after declaring that every disposition in favor of a person incapable of receiving shall be null, though made under the name of persons interposed, provides that the children of the incapable person shall be reputed persons interposed, does not contemplate the case where the children of such incapable person, are also the legitimate or duly acknowledged natural children of the donor or testator; in such a case if there be any interposition, it must be proved. *Ibid.*

12. Where the deceased has left no legitimate children or descendants, but a legitimate brother or sister, and descendants from other legitimate brothers, his natural children can receive from him, by donation *mortis causa*, not more than one-fourth in value of his property. C. C. 1473. *Ibid.*

13. A testator leaving three or more children, or the descendants of three or

more children, cannot dispose by donation *mortis causa* of more than one-third of his property. C. C. 1480. *Webber* v. *Goodby*, 539.

14. Grandchildren, forced heirs of the testator by representation of their mother, are bound to collate any legacy made to them by the testator, unless expressly made as an advantage over their co-heirs and besides their legitimate portion. C. C. 1306, 1307. *Ibid.*

15. A clause in a will directing that certain slaves shall be emancipated at a future period, and transported to Africa, will not be rendered void by a provision directing, in case of their return to the State, that they shall again become slaves. The illegality of the condition does not render the previous provision null. *Rost* v. *Henderson*, 549.

16. The testator having provided that ten slaves should be drawn by lot out of the whole number belonging to his estate, and transported to Africa, if willing to go, among the number so drawn was one under eleven years of age. In an action by the executors to compel the heirs of the deceased to give up the slaves so drawn, to be transported as directed by the testator, *Held:* that the slave under eleven years of age, being unable to give his consent, the provision of the will cannot be carried into effect as to him. *Ibid.*

17. Where a testator leaves no legitimate children nor descendants, but legitimate brothers or sisters, or descendants from them, an acknowledged natural child may receive from him, by donation *mortis causa*, one-fourth of his property. C. C. 3473. *Balot y Ripoll* v. *Morina*, 552.

18. Where by a donation *mortis causa* a testator disposes, in favor of an acknowledged natural child, of more than the law allows, the disposition is not null for the whole, but reducible to the *quantum* allowed by law. C. C. 1489. *Ibid.*

19. A donation *mortis causa* may be made in favor of a foreigner, where the laws of his country do not prohibit a similar disposition from being made in favor of a citizen of this State. *Succession of Mager*, 584.

20. A bequest by a testatrix of "all her property," includes moveables as well as immoveables, separate as well as partnership property, and all transmissible rights, whether dotal, paraphernal, or belonging to the community. *Keller* v. *McCalop*, 639.

21. By a will executed in the State of South Carolina, a testatrix declared as follows: "I give to my daughter S. S. C., one-fifth of all my estate, both real and personal, during her natural life, and afterwards to her children, the heirs of her body, forever." The children were in being at the time of the devise. In an action by the heirs of the daughter, claiming certain slaves who belonged to the testatrix: *Held*, that this was a donation of the slaves to the daughter for her natural life, and afterwards to her children, the heirs of her body, forever. *Calmes* v. *Carruth*, 660.

See SUCCESSIONS, 33.

ELECTIONS, INSPECTOR OF

See Offences and Quasi Offences.

ERROR.

A judgment of nonsuit having been set aside, and a new trial allowed, at the succeeding term after the new trial had, and a judgment entered on the minutes for the plaintiff, the judge by mistake signed the judgment of nonsuit, which had been transcribed on the petition. *Held*, that the judgment of nonsuit, having been set aside within the time prescribed by law, was a nullity, and could not be reinstated by the subsequent inadvertent signature of the judge *Hatch* v. *English*, 153.

EVIDENCE.

I. *Onus Probandi.*
II. *Presumption.*
III. *Competency of Witness.*
IV. *Commission to take Testimony.*
V. *Judicial Records and Proceedings, and copies thereof.*
VI. *Non-Judicial Records and other Written Instruments.*
VII. *Proof of Contracts, not in Writing, over Five Hundred Dollars in Value.*
VIII. *Admissibility of Evidence to Explain Written Instruments.*
IX. *Admissibility of Evidence under the Pleadings.*
X. *Proof of Fraud.*
XI. *Proof of Acknowledgment of Illegitimate Children.*
XII. *Proof of Donations Inter Vivos.*
XIII. *Proof of Donations Mortis Causa.*
XIV. *Evidence of Parties.*
XV. *Evidence in particular Actions.*
1. *In Actions to Annul Sales of Community Property.*
2. *In Actions on Bills of Exchange or Promissory Notes.*
3. *In Actions on Particular Contracts.*
4. *In Petitory Actions.*
5. *In the Settlement of Successions.*
6. *In the Settlement of Tutors' Accounts.*
7. *In Summary Proceedings in rem for cost of work on Levées.*
8. *In Proceedings Via Executiva.*

I. *Onus Probandi.*

1. Where an act of sale is attacked by a creditor of the vendor as simulated,

on the ground that no price was paid, proof of payment of the price is on the party interested to maintain the sale. The creditor cannot be required to prove a negative. *Fisher* v. *Moore*, 95.

2. A promise to pay pre-supposes a consideration. It is for the party seeking to avoid the promise to show that there was none.

Marigny v. *Union Bank of Louisiana*, 283.

3. The burden of proof is on the party affirming. *Ibid.*

4. Where a promise has been made, a just cause will always be presumed. It is for the party promising to exonerate himself, by showing that it was without any just or legal cause. *Brashear* v. *Hazard*, 328.

5. Defendants sued by the transferree of a note made by them, but not negotiable, pleaded their discharge under the insolvent laws. The schedule of the insolvents showed, that the payee of the note was placed on it as a creditor for a sum exceeding the amount of the note. It was not proved that the note had been transferred to plaintiff, nor that defendants were notified of the transfer previously to filing their *bilan*. *Held*, that it was for the plaintiff to show that the amount for which the payee was placed on the *bilan* as a creditor did not include the note sued on; and there being no allegation that defendants have acquired any property since their discharge, that there must be a judgment of nonsuit. *Vauquelin* v. *Platet*, 381.

6. Where a factor transmits to his principal accounts of the sales of his crops, and of advances of money and purchases made for him, and proves their receipt by the principal, and the latter receives such accounts without objection, and acknowledges the receipt of the articles purchased for him, he will be presumed to have assented to the correctness of the account; and in an action by the factor for a balance due to him, the burden of proving that the crops sold for more, or that the articles furnished had been purchased for less than the account shows, is on the defendant.

Ledoux v. *Porche*, 543.

See 38, 58, *infra*. CONTRACTS, 12.

II. *Presumption.*

7. Art. 1478 of the Civil Code, which after declaring that every disposition in favor of a person incapable of receiving shall be null, though made under the name of persons interposed, provides that the children of the incapable person shall be reputed persons interposed, does not contemplate the case where the children of such incapable person, are also the legitimate or duly acknowledged natural children of the donor or testator; in such a case if there be any interposition, it must be proved. *Compton* v. *Prescott*, 56.

8. Property of all kinds found in the possession of a person at the time of his death, is presumed to belong to his succession. *Lynch* v. *Benton*, 113.

9. A promise by a third person to pay a bill or note for the endorser, to be binding on the former, must be made with full knowledge by him of any want of due diligence on the part of the holder which may have exonerated the endorser; but direct proof of such knowledge is not necessary. It may

be inferred from the promise under the attending circumstances, as where the promise was to pay the principal due, without interest. In such a case it will be inferred that the circumstances discharging the endorser were known, for, if the protest were regular, interest would run from its date.

Bell v. *Lawson*, 152.

10. Where the judge before whom an action on a twelve-months bond was tried was sworn as a witness to prove a signature, but the record omits to state the name of the person whose signature he was sworn to prove, though it shows that a judgment was rendered by the same judge in favor of the plaintiff, it will be presumed that the person, the proof of whose signature was essential to a recovery, was the one whose signature was actually proved. *Coons* v. *Graham*, 206.

See 2, 4, 6, *supra*.

III. *Competency of Witness.*

11. Where other sureties have been substituted, the original surety in an injunction bond may be examined as a witness for the plaintiff in injunction, though, by the statute of 25 March, 1831, § 3, it is declared, that the surety on the bond shall be considered as a party to the suit, and be liable to be condemned, *in solido*, with the plaintiff, for damages and interest.

Williams v. *Planters Bank*, 125.

See 35, 36, *infra*.

IV. *Commission to take Testimony.*

12. Where the names of some of the witnesses whose testimony has been taken under a commission were not mentioned in the commission, nor in the notice given to the other party to attend at the time and place fixed by the commissioner for taking the evidence, their testimony will not be admissible.

Flower v. *Downs*, 101.

V. *Judicial Records and Proceedings and Copies thereof.*

13. Proceedings in an action of partition, cannot be offered in evidence against one not a party to the action. Nor will the fact of his not having exhibited any title, or plat of survey, to the surveyor engaged in making such partition, though aware of the proceedings, affect his rights. He was not bound to exhibit any evidence against himself, and had a right to stand upon his possession. *Hemken* v. *Brittain*, 46.

14. Although on a prayer of *oyer* by defendant, the object of which is to obtain information to aid him in shaping his defence, plaintiff file a mutilated or imperfect copy of a will, he will not be precluded from giving in evidence, on the trial, a true and authentic copy of the instrument on which he relies as his muniment of title. *Graves* v. *Hemken*, 103.

15. Where the names of the signers of a twelve-months bond do not appear in the body of the instrument, nor in the return of the sheriff, and there is

no attestation by the sheriff that it was signed before him, or in the presence of witnesses, the signature of a surety must be proved, to entitle the party in whose favor it was made, to recover against such surety.

Coons v. *Graham*, 206.

16. A return by a marshal on an attachment, "that he had executed the writ by seizing in the hands of A. all sums of money, rights, credits, and property belonging to the defendant, to an amount sufficient to satisfy the debt," &c., is alone no evidence that any thing was actually seized.

Poole v. *Brooks*, 484.

17. Where the records of a court of justice show that a judgment was pronounced on a particular day, evidence of witnesses is inadmissible to show that no such judgment was pronounced. *Per Curiam:* Parol evidence is inadmissible to contradict the records of a court of justice.

Nolan v. *Babin*, 531.

VI. *Non-Judicial Records and other Written Instruments.*

18. A declaration by the vendor in an act of sale *sous seing privé*, that the price had been paid, is not proof of payment against third persons.

Fisher v. *Moore*, 95.

19. A bill of lading is evidence of a shipment as between the carrier and shipper, but not of delivery to the consignee. *Flower* v. *Downs*, 101.

20. Where it is proved that one of the subscribing witnesses to a power of attorney is dead, and that the residences of the others are out of the State or unknown, it will be admissible in evidence on proof of the signature of the principal.

Grand Gulf Railroad and Banking Company v. *Barnes*, 127.

21. Where an act of sale of real property was signed by the parties in the presence of a parish judge, acting as a notary, no other proof of execution is necessary to authorize its being recorded, and to give it the effect against third persons which the law allows to acts *sous seing privé* duly registered. C. C. 2242, 2250. *Hood* v. *Segrest*, 210.

22. An act of sale, not authentic, owing to the want of the signature of one of the witnesses, or through any other defect of form, is good as a private writing, if signed by the parties. C. C. 2232. *Ibid.*

23. The private account books of brokers are not admissible in evidence in their favor, (C. C. 2244); but witnesses by whom entries were made in them, of matters within their personal knowledge, may refer to such entries to refresh their memory. *Kendall* v. *Bean*, 407.

24. The letters of a party acknowledging that, in consideration of a certain sum, a third person had become jointly and equally interested with him in the purchase of real estate held in his name, and agreeing, for a fixed price, to convey to the same person one-half of his interest in a purchase of other lands, is evidence of a sale as between the parties, and the lands may be mortgaged by the purchaser, or subjected to legal mortgages as his property. *Per Curiam:* A sale, as between the parties, is complete as soon as there exists an agreement as to the object and the price, though the object

be not delivered, nor the price paid, (C. C. 2413, 2431); the only formality required by law, as between the parties, is that the sale, when of immoveables, shall be in writing. C. C. 2415. *Barrett* v. *His Creditors*, 474.

See 41, *infra*.

VII. *Proof of Contracts, not in Writing, over Five Hundred Dollars in Value.*

25. To enable a party to recover the amount of a promissory note alleged to have been deposited with defendant as collateral security, the proceeds of which, exceeding five hundred dollars, were received by the defendant, the deposit must be proved by the testimony of at least one witness, supported by corroborating circumstances. *Escurieux* v. *Chapdu*, 520.

VIII. *Admissibility of Parol Evidence to Explain Written Instruments.*

26. Parol evidence is admissible to show in what manner a contract for the sale of lands has been executed by the parties, and how far the possession has conformed to the act of sale. *Marcotte* v. *Coco*, 167.

27. Parol evidence is admissible to show that the land in dispute is not included in the conveyance under which plaintiff claims. *Per Curiam:* The fact might have been more properly shown by a survey of the premises, or by a plan annexed to the act of sale; but in their absence, parol evidence is admissible. *Hiestand* v. *Forsyth*, 371.

IX. *Admissibility of Evidence under the Pleadings.*

28. A plaintiff may introduce any evidence necessary to disprove or rebut the allegations made by the defendant in his answer, though the facts offered to be proved by the former were not alleged in the petition. No replication being allowed, all new facts alleged in the answer are considered as denied. C. P. 229. *Riley* v. *Wilcox*, 648.

29. Where, in an action for wages as an overseer, plaintiff alleges that he was engaged for one year from the first of January, and that he performed the duties of an overseer from that day, he will not be allowed to show that, although he was engaged from that day it was understood between the contracting parties, that he was not to take full charge of the plantation till the 6th of the month. If the contract was subject to such a condition, it should have been alleged. *Ibid.*

X. *Proof of Fraud.*

30. A creditor having obtained a judgment against his debtor, caused certain property to be sold under execution, and became the purchaser. In an action by other creditors, against the debtor and purchaser, to annul the sale as fraudulent and intended to give an unjust pr ference to the latter, plaintiffs offered to prove declarations made by the debtor, out of the presence of the seizing creditor, tending to establish the fraudulent intention of the par-

ties: *Held*, that the evidence, though insufficient to prove the alleged fraud as against the seizing creditor, was admissible.

Whiting v. *Prentice*, 141.

31. To annul a sale, at which the plaintiff in execution became the purchaser of the property sold, on the ground that the latter knew that the debtor was insolvent, and that the sale was made with intent to defraud other creditors, plaintiff must prove that the purchaser knew that the debtor was insolvent.

Ibid.

32. Fraud will not be presumed; like other allegations it must be proved; but it may be proved by circumstantial as well as by direct evidence; by simple as well as by legal presumptions. C. C. 1842.

Marigny v. *Union Bank*, 283.

See 48, *infra*.

XI. *Proof of Acknowledgment of Illegitimate Children.*

33. Illegitimate children of color, not the offsping of an incestuous or adulterous connection may prove their acknowledgment, by a white father, where such acknowledgment has been made by the latter, in a declaration before a notary public, in presence of two witnesses, not in the registry of the birth or baptism of such child; but no other proof of acknowledgment is admissible in favor of colored children, claiming descent from a white father. C. C. 221, 222, 226. *Compton* v. *Prescott*, 56.

XII. *Proof of Donations Inter Vivos.*

34. Parol proof that a promissory note, payable to the order of the donor, and by him endorsed in blank, was delivered to plaintiff as a gift, is insufficient to enable her to hold it as a gratuitous donation *inter vivos*. Such a donation must be by an act before a notary, in the presence of two witnesses. C. C. 1523. *Morres* v. *Compton*, 76.

XIII. *Proof of Donations Mortis Causa.*

35. The son-in-law of a legatee is competent as a witness to the will. The relations and connections of a legatee are not incompetent to prove a will. C. C. 1585. Arts. 2260, 2261 of the Civil Code, do not apply to witnesses to a will. *Keller* v. *McCalop*, 639.

36. As a general rule, all persons are competent as witnesses to a will unless expressly excluded. *Ibid.*

37. Where a testament by public act recites, "that this last will was dictated by the testatrix to me, the said notary public, by whom it was written as dictated to me, and then read to the testatrix, who declared to have perfectly understood it and to persist therein, all of which was done in the presence of the said attending witnesses," it is sufficient proof that the will was read to the testatrix in the presence of the witnesses, that it was dictated by her at the time it purports to have been signed, that it was written as dictated, and that it was read to the testatrix by the notary. *Ibid.*

38. The formalities prescribed by art. 1571 of the Civil Code for the execution of nuncupative testaments by public act must be fulfilled at one time, without interruption, and without turning aside to other acts; but it is not necessary that express mention should be made in the will that they have been so fulfilled. It is for the party who attacks the will to show that they have not been so fulfilled. *Ibid.*

XIV. *Evidence of Parties.*

39. Where interrogatories are propounded by defendant to a plaintiff who resides in another state, and the order to answer them fixes no period within which the answers shall be made, and it is not proved that the attorney of the absentee was served with any notice of the order or a copy of the interrogatories, they cannot, on failure of plaintiff to answer, be taken for confessed. Act 10 February, 1843. *Graves* v. *Hemken*, 103.

40. Interrogatories propounded to a bank as a party to an action, should be answered by the president of the bank; answers by the cashier alone, are insufficient. *Commercial Bank of Natchez* v. *Guice*, 181.

41. The acknowledgment by the vendor, in an authentic act of sale of real estate, that the price had been received by him, can be contradicted only by a counter letter, or by the acknowledgment of the purchaser, or his heirs, in answer to interrogatories on facts and articles.

Succession of Thomas, 215.

42. In proceedings under the 13th section of the act of March 20, 1839, by which a plaintiff who has applied for a writ of *fi. fa.* is authorized to propound interrogatories to a third person, believed to have property in his possession, or under his control, belonging to the debtor, or to be indebted to him, the formalities of law must, as in cases of attachment, be strictly complied with, under penalty of nullity. Thus, where interrogatories have been propounded to a third person to be answered in open court within a certain time, and they are ordered to be answered "as prayed for and according to law," but without any particular day having been appointed therefor, the party interrogated is not bound to answer, and, on his failure to do so, the interrogatories cannot be taken *pro confessis*. Where interrogatories are required to be answered in open court, the plaintiff must move the court to appoint a day on which the answer shall be made; and where he proceeds to trial without having done so, his right to have the interrogatories answered will be considered as waived. *Petway* v. *Goodin*, 445.

43. Garnishees in cases of attachment, and third persons to whom interrogatories are authorized to be propounded by the 13th section of the statute of 20th March, 1839, are parties to the controversy at least as between the plaintiff and themselves, and may be required to answer, in open court, any interrogatories propounded to them. *Ibid.*

44. One who resides out of the State may appeal from a judgment rendered against him at any time within two years from the day on which final judgment was rendered (C. P. 593); and where plaintiffs allege in their petition

and affidavit for an attachment that defendants are non-residents, it is sufficient evidence of such non-residence.

Kraeutler v. *Bank of United States*, 456.

45. Where one to whom interrogatories have been propounded under the 13th sect. of the act of 20 March, 1839, fails to answer within the delay fixed, such failure will, as in the case of a garnishee, be considered as a confession of his having property belonging to the debtor sufficient to satisfy the demand, and a final judgment may be rendered against him, on motion, without notice, for the amount of the demand, with interest and costs. C. P. 263. *Aliter*, where the party interrogated denies being indebted, and it is attempted to disprove his answers; in such a case an issue is joined, and the party must have an opportunity of being heard before he can be condemned. *Poole* v. *Brooks*, 484.

46. To disprove answers made under oath by a party to a suit to whom interrogatories have been propounded, the testimony must be positive and certain. *Graneri* v. *Talbot*, 526.

47. A party to the record is inadmissible as a witness.

Baudoin v. *Nicolas*, 594.

XV. *Evidence in Particular Actions.*

1. *In Actions to annul Sales of Community Property.*

48. To annul a sale of community property made by a husband, it is not enough, under art. 2373 of the Civil Code, to show that it was simulated; it must be proved to have been fraudulently made, with a view to injure the wife. *Succession of Packwood*, 334.

2. *In Actions on Bills of Exchange and Promissory Notes.*

49. The certificate of a notary that he presented a note, which was payable at the office of a parish judge, at the said office, to a person in the office, and demanded payment thereof, and was informed that there were no funds to pay it, is sufficient evidence of demand against the drawer of the note.

Dosson v. *Sanders*, 238.

50. In an action on a bill accepted by an agent, the evidence of witnesses who testify that they had seen the written authority by which defendants empowered the agent to accept bills for them, will be admissible, where the power itself is not in plaintiff's possession, nor under his control.

Kraeutler v. *Bank of United States*, 456.

51. Action by the holder against the maker of a note, endorsed by the payee in blank, and on which the latter had written an acknowledgment of the receipt of its value from the plaintiff, and at the same time warranted its payment to the plaintiff, or his assigns: *Held*, that judgment by default could not be confirmed against the defendant, without proof of the endorsement of the payee, and of his signature to the transfer written on the note. Proof of a plaintiff's demand is required in all cases when not admitted by the defendants. C. P. 312, 360. *Young* v. *Talbot*, 518.

3. *In Actions on Particular Contracts.*

52. Where a purchaser promises in a written memorandum signed by him, to pay the price "by acceptance and note," the vendor must prove a demand of such acceptance and note, to entitle him to recover in an action on the memorandum for the price in money. *Offutt* v. *Morancy*, 92.

53. To entitle a plaintiff to recover on a contract executed by a person acting as an agent, the authority of the agent must be proved.
Carpenter v. *Beatty*, 540.

4. *In Petitory Actions.*

54. Where a plaintiff claims to be the owner of land which he alleges that the defendant has taken possession of and refuses to deliver, and prays for a judgment for the land with damages for its detention, he must prove his own title, and show that it covers the land in the adverse possession of the defendant. *Heinken* v. *Brittain*, 46.

55. In a petitory action the plaintiff must make out a valid title in himself, or judgment will be given for the defendant. *Hiestand* v. *Forsyth*, 371.

5. *In the Sett'ement of Successions.*

56. An admission of the genuineness of the signature to vouchers filed by the curator of a succession in support of his account, dispenses with any other proof of the payments claimed by him; but where such payments are made, without any order of court, the curator must show that the debts were really due by the succession, or he will not be entitled to credit for the amounts so paid. *Miller* v. *Miller*, 88.

57. Where one, who claims to be the creditor of a succession for the amount of an open account, in which he charges the estate with the amount of a draft drawn by the deceased and accepted by him, and with a commission for accepting it, neither produces the draft nor accounts for it, nor shows that it was paid by him, his claim must be rejected.
Succession of Floyd, 197.

6. *In the Settlement of Tutors' Accounts.*

58. Where, after the death of the wife, the surviving husband, being the natural tutor of their minor children, transfers stock in an insurance company, which belonged to the community of *acquests*, in payment of his individual debts, at a rate greatly exceeding its real value, he should not, where third persons are interested, be charged in the settlement of the community with the amount for which the stock was taken in payment, but with its real value at the time of the transfer, unless it be shown that the stock afterwards increased in value; and the burden of proving such increase is on the heirs of the wife. *Per Curiam:* The tutor is only bound to return to the minor the estimated value of those moveables which he cannot restore in kind. C. C. 333. *Mercier* v. *Canonge*, 386.

59. A tutor being bound to procure medical assistance, when necessary, for the minor, the receipt of a physician for the amount of his fees for such ser-

vices paid by the tutor, and admitted without opposition, is a sufficient voucher to entitle the latter to credit for the amount. *Per Curiam:* A tutor is not bound to procure evidence of the necessity for such services, where the amount paid is not large, and nothing authorizes the presumption that the payment was improperly made.

Richard v. *Blanchard*, 524.

7. In Summary Proceedings in rem for Cost of work on Levées.

60. Where the police regulations of a parish require that notice in writing shall be given to resident proprietors personally, or at their domicil, of all work required to be done on any levée, the land on which such work is to be done, if the property of a resident proprietor, cannot be made liable, by a summary proceeding *in rem*, for the cost of such work, though executed in pursuance of an adjudication by the overseer of roads and levées, without proof of written notice, served personally, or at the domicil of the proprietor. The certificate of the inspector of roads and levées is not conclusive proof of notice, as against the proprietor; and parol evidence is admissible to prove that no sufficient notice was given. *Hamilton* v. *Michel*, 593.

8. In Proceedings Via Executiva.

61. The authentic evidence required to authorize the issuing of an order of seizure and sale must be complete so far as relates to the debt. Thus, where a mortgage by authentic act was executed under power of attorney, or where a note secured by such a mortgage has been assigned, the power and the assignment must be proved by authentic acts. As relates to the capacity of persons suing *en auter droit, prima facie* evidence of their right is sufficient. In such a case, copies of the bond and oath of a curator, certified under the hand and seal of the probate judge to be true copies from the originals on file in his office, will be sufficient evidence of the capacity of the plaintiff, though the letters of curatorship would be perhaps, better evidence. *Dosson* v. *Sanders*, 238.

EXCEPTION.

See PLEADING, IV.

EXCHANGE AND BANKING COMPANY OF NEW ORLEANS.

The 27th section of the statute of 1st April, 1835, incorporating the Exchange and Banking Company of New Orleans, authorizing a "wife to bind herself jointly and *in solido* with her husband in all hypothecary contracts or obligations entered into by him in favor of that institution," does not empower a wife to bind herself with her husband, for the price of stock of the company, purchased in her name during the existence of the matrimonial community. *Per Curiam:* The provision in favor of the bank being in derogation

of the general rule prescribed by art. 2412 of the Civil Code, must be strictly construed. It cannot be extended to cases not clearly within its purview.
Commissioners of Exchange and Banking Company v. *Bein*, 579.

EXECUTION OF JUDGMENT.

1. Where property has been seized under a *fi. fa.*, before the return day, the sheriff may retain the writ, and sell the property after the time fixed for its return. *Labiche* v. *Lewis*, 8.

2. To prevent the sacrifice of debts seized under a *fi. fa.*, the parties to the execution agreed that the sheriff should suspend the sale and retain the writ after the return day, authorizing an agent to proceed to collect the debts. Other creditors of defendants in execution, subsequently to this agreement, levied a *fi. fa.* on the same debts in the hands of the sheriff, and it was agreed between them and the plaintiff in the original execution, that the debts should be sold under the first writ, "the proceeds of the sale to be held by the sheriff, subject to the orders of the proper court." In an action to determine which of the seizing creditors was entitled to the proceeds: *Held*, that no bad faith being imputed to the parties, they had a right to suspend the sale: that the debts never ceased to be under the control of the sheriff; that having permitted the sale to be made under the first execution, the creditors in the second execution cannot attack its legality; and that the creditor who first seized is entitled to a preference on the proceeds of the sale. C. P. 722. *Ibid.*

3. Notice to the debtors is not required where debts or credits have been seized under a *fi. fa.*; such notice is only necessary where a debt or credit has been transferred or assigned. The seizure of a debt does not transfer the property in it to the seizing creditor; it gives him only a right to be paid out of its proceeds when sold, until which time the defendant is not divested of his title. *Ibid.*

4. Where slaves have been seized under a *fi. fa.*, and the sheriff, with the consent of the plaintiff in execution, leaves them with the debtor until the day of sale, they will be considered as in the legal custody of the sheriff; and one proved to have aided the debtor in removing them beyond the limits of the State, with a view to defraud his creditors, will be responsible to the latter to the extent of the injury they may sustain in consequence, and the full value of the slaves will be the measure of damages, if the debt amounts to so much. C. C. 2294, 2295, 2304. Testimony that will satisfy a jury of the guilt of the defendant is sufficient to maintain the action; and every fact proved, calculated to produce this conviction, should be considered, in coming to a conclusion as to his knowledge of the fraud.
Smith v. *Berwick*, 20.

5. The undivided share of an heir in a succession may be seized and sold under execution (C. P. 647); but a creditor of an heir cannot seize and sell the right of his debtor to a part of the property inherited by him. The seizure must be of the whole of his rights in the succession, subject to the charges with which they may be burthened. *Mayo* v. *Stroud*, 105.

6. A sale under *fi. fa.* made before the promulgation of the statute of 6 April, 1843, ch. 135, in a parish in which a newspaper was published at the time, and not advertised therein as directed by art. 669 of the Code of Practice, will be annulled, unless in cases embraced by the statute of 2 February 1828, ch. 29, where the amount of the judgment under which the seizure was made, is less than three hundred dollars. *Ex parte Groves*, 130.

7. Where the price bid at a sale under a *fi. fa.* does not exceed the amount of anterior special mortgages existing on the property, there can be no adjudication. C. P. 684. *Ibid.*

8. Where a *fi. fa.* has been issued against a defendant before notice of judgment served on him as required by law, he may require that the *fi. fa.* be quashed, and a suspensive appeal allowed. But where he contents himself with taking a devolutive appeal only, he cannot afterwards complain. *Hatch* v. *English*, 135.

9. Where the owner of property seized under execution becomes its purchaser, at a credit of twelve months, he cannot be considered as acquiring any new right or title by the adjudication, which is not strictly a sale, but a means by which the creditor acquires additional security for his debt. Nor will the sureties on the bond be discharged by the omission of the creditor to require the execution of an act of sale to the debtor, with the reservation of a mortgage on the property to secure the price, though the sureties might, for their own protection, have insisted on such an act of sale being executed and recorded. *Aliter*, if, having received a mortgage, the creditor had subsequently released it; in such a case the sureties would be discharged. C. C. 3030. *Coons* v. *Graham*, 206.

10. Where the principal in a twelve-months bond is estopped by his execution of the bond from urging any informalities in the sale, as a defence to an action on the bond, his sureties, bound *in solido* with him, will be equally estopped from setting up any such defence. *Ibid.*

11. Plaintiff having seized, under a *fi. fa.*, a sum in the hands of a third person, as the property of defendants, his debtors, the State intervened, alleging that the amount had been illegally paid to such third person by the treasurer: *Held*, That the payment being unauthorized, the amount should be returned into the treasury. *Gore* v. *Commercial Library Society*, 311.

12. The purchaser of property sold under execution subject to special mortgages, is entitled to retain out of the price the amount required to pay such mortgages. C. P. 679, 683. But this privilege being allowed merely to protect him from the danger of paying twice, where the debts secured by mortgage have been extinguished by prescription or otherwise, the purchaser can no longer retain the amount. The extinction by prescription, after the purchase, of a debt evidenced by a note and secured by mortgage, and which formed a part of the price, enures to the benefit of the mortgagor, not of the purchaser. *Per Curiam:* The debt due by note is prescribed by five years from its date, while the obligation of the purchaser to pay the price is only prescribed by ten years. *Collier* v. *His Creditors*, 389.

13. An overseer being entitled to one-fourth of the crop for his services, a creditor of the owner of the plantation seized under a *fi. fa.* three-fourths of the growing crop, and became the purchaser thereof at the sheriff's sale. In an action by the overseer against the purchaser; *Held*, that the seizure did not operate as a partition between the overseer and his employer, nor restrict the right of the former to the fourth not seized; and that the purchaser, acquiring no greater right than his debtor had, is liable to the overseer for one-fourth of the price for which the three-fourths of the crop were sold. *Baudoin* v. *Nicolas*, 574.

EXECUTOR.

See SUCCESSIONS, IV.

EXECUTORY PROCESS.

The authentic evidence required to authorize the issuing of an order of seizure and sale must be complete so far as relates to the debt. Thus where a mortgage by authentic act was executed under power of attorney, or where a note secured by such a mortgage has been assigned, the power and the assignment must be proved by authentic acts. As relates to the capacity of persons suing *en auter droit*, *prima facie* evidence of their right is sufficient. In such a case, copies of the bond and oath of a curator, certified under the hand and seal of the probate judge to be true copies from the originals on file in his office, will be sufficient evidence of the capacity of the plaintiff, though the letters of curatorship would be, perhaps, better evidence. *Dosson* v. *Sanders*, 238.

FIERI FACIAS.

See EXECUTION OF JUDGMENT.

FRAUD.

1. To annul a sale, at which the plaintiff in execution became the purchaser of the property sold, on the ground that the latter knew that the debtor was insolvent, and that the sale was made with intent to defraud other creditors, plaintiff must prove that the purchaser knew that the debtor was insolvent. *Whiting* v. *Prentice*, 141.

2. Fraud will not be presumed; like other allegations it must be proved; but it may be proved by circumstantial as well as by direct evidence; by simple as well as by legal presumptions. C. C. 1842. *Marigny* v. *Union Bank*, 283.

3. The holder of a negotiable note given for the price of property fraudulently sold by a debtor after obtaining a respite, cannot recover on it, though taken before maturity, where the evidence shows that he was aware of the fraudulent character of the sale. *Pralon* v. *Aymard*, 486.

See EVIDENCE, 30, 48.

HUSBAND AND WIFE.

I. *Paraphernal Property.*
II. *Community of Gains.*
III. *Contracts of Married Woman.*

I. *Paraphernal Property.*

1. A husband has authority to receive whatever may be due to his wife on account of her paraphernal property, when such property is not proved to be under her sole and separate administration; and a payment to him will discharge the debtor. C. C. 2362. *Richard* v. *Blanchard*, 524.

See 12, *infra.*

II. *Community of Gains.*

2. Where it is stipulated by the first clause of a marriage contract, that, "there shall be a community between the parties, which shall comprehend all their estate, real and personal, present and to come," and by a subsequent one that, "in case of the death of either the husband or wife, without having a child or children by the marriage, the amount of the property brought into the community by the one that shall die first, with the profits arising from the community, shall revert to the surviving husband, or wife, as the case may be," the words "*property brought into the community*," used in the latter clause, will be construed with reference to the first, which establishes what property the community shall consist of; and in case of the death of the wife without issue of the marriage, the surviving husband will be entitled to all the estate "real and personal, present and to come," of which, by the first clause of the contract, it is declared that the community shall be composed. *Fabre* v. *Sparks*, 31.
3. A wife, who has concealed or converted to her own use, without accounting therefor, or made away with any of the effects of the community of gains, cannot renounce the community. C. C. 2387. But for whatever cause she may have forfeited the right of renouncing, she can be made responsible only for one-half of the debts contracted during the marriage. C. C. 2376. *Lynch* v. *Benton*, 113.
4. A wife may render herself personally liable for one-half the debts of the community, by her acts, though done without any fraudulent intent; as by taking an active concern in the affairs of the succession, or by failing to make an inventory, before making her renunciation, and within the legal delays, &c. *Ibid.*
5. Where plaintiffs claim, as heirs of their mother, one-half of certain community property sold by the husband after the death of the wife, and the vendee proves that the price of the property was applied to the payment of the debts of the community, he will be entitled to the reimbursement of the amount so paid for its benefit, in proportion to plaintiffs' interest in the community. *Calvit* v. *Mulhollan.—Re-hearing*, 266

6. Stock in a bank here secured on real estate, acquired before the removal of the spouses from this State, having the same *situs* with the immoveable on which it is a charge, and being transferrable only on the books of the bank situated here, whether considered as a moveable according to art. 466 of the Civil Code, or an immoveable under art. 462, forms part of the community property. *Succession of Packwood*, 334.

7. Where a husband and wife, married in another State, remove into this, the laws establishing and regulating the matrimonial community of gains will operate upon the property acquired during their residence here: and where they subsequently remove from this State, its laws will cease to operate upon property afterwards acquired here, such acquisitions becoming the the property of the party to whom they may belong according to the law of the new domicil of the spouses. *Ibid.*

8. The removal of the husband and wife into another State, does not vest in either spouse any distinct or separate title to one undivided half of the community property previously acquired here. So long as the marriage continues, the husband retains his power over the property of the community; he has a right to enjoy its fruits; it is liable for his debts contracted after as well as before the change of domicil; and he may sell it, if the sale be not fraudulent. On the death of the wife, one-half of the property still in existence, acquired during the residence of the spouses here, will vest in the heirs of the wife, subject to the payment of the debts contracted by the husband during the marriage. *Ibid.*

9. The property found at the dissolution of the marriage, constitutes the body of *acquests* and gains. *Ibid.*

10. To annul a sale of community property made by a husband, it is not enough, under art. 2373 of the Civil Code, to show that it was simulated; it must be proved to have been fraudulently made, with a view to injure the wife. *Ibid.*

11. A husband and wife, between whom a community of *acquests* existed in this State, having acquired a plantation which formed part of the community property, subsequently removed into a State where the common law prevails. After their removal, the husband and wife sold the plantation. After the death of the wife, the husband and the purchaser cancelled the sale; the notes given for the price were returned to the purchaser, and the plantation re-conveyed to the husband. The husband having qualified in this State as executor of his wife, on an opposition to an account filed by him, made by the heirs of the wife, claiming that the retrocession should enure to the benefit of the community, or that the husband should account to the heirs of the wife for one-half of the price: *Held*, that on the retrocession, the title vested in the husband alone; and that if the wife had any interest in the notes, the executor is not bound to account for it here, as both spouses lived in another State at the time, and the fund does not belong to the community. *Ibid.*

12. Where real estate belonging to a community existing between a husband and wife, is sold by the husband, and the spouses afterwards remove from

this State, and the wife dies out of this State, the husband will not be accountable here for the price, if not existing here at the death of the wife. *Per Curiam:* The husband is no more accountable for that transaction than for the price of any other property sold by him before the dissolution of the community. *Ibid.*

13. Real property inherited by one of the spouses during the marriage, and existing in kind at the time of its dissolution, should not be included in the settlement of the community between the survivor and the heirs of the deceased spouse; it must be withdrawn by the owner in the condition in which it existed at the dissolution of the marriage. If built upon, or improved during the marriage, the owner of the soil has a right to keep the improvements on accounting to the other spouse for one-half of the enhanced value of the property. C. C. 2377. He has no right to abandon the soil to the other spouse, nor to the community, and to claim in its place the amount of a previous valuation of it, thereby prejudicing the rights of others. *Mercier* v. *Canonge*, 385.

14. Where after the dissolution of the community, the surviving spouse borrows a sum on the pledge of bank stock belonging to it, he should be charged in the settlement of the community, only with the sum borrowed, and not with the whole amount of the stock, which continues the property of the community. *Ibid.*

15. Where after the death of the wife, the surviving husband, being the natural tutor of their minor children, transfers stock in an insurance company, which belonged to the community of *acquests*, in payment of his individual debts, at a rate greatly exceeding its real value, he should not, where third persons are interested, be charged in the settlement of the community with the amount for which the stock was taken in payment, but with its real value at the time of the transfer, unless it be shown that the stock afterwards increased in value; and the burden of proving such increase is on the heirs of the wife. *Per Curiam:* The tutor is only bound to return to the minor the estimated value of those moveables which he cannot restore in kind. C. C. 333. *Ibid.*

16. In the settlement of the community, dividends on stock belonging to it received by the surviving spouse after its dissolution, must be placed to its credit; and it must be debited with the amount of any interest on its debts paid by the survivor. *Ibid.*

17. Property purchased under the authority of the husband in the name of a wife, between whom and her husband there existed a community of *acquests*, but not paid for with her paraphernal funds under her separate administration, nor received by her as a *dation en payement* from a debtor of a separate and paraphernal claim, belongs to the community. The contract is as binding on the community as if made by the husband, and the wife neither becomes the owner of the property nor incurs any personal responsibility therefor, (C. C. 2371, 2372, 2375, 2378, 2379, 2393); nor could she in any manner bind herself with her husband for the payment of the price. C. C. 2412. *Commissioners of Exchange and Banking Company* v. *Bein*, 578.

III. *Contracts of Married Women.*

18. Where a married woman, under the authorization of her husband, sells a tract of land, retaining a mortgage to secure the payment of the price, and by the same act, without any pecuniary consideration personal to her, agrees to give priority to a mortgage to be executed by her vendee, in favor of a third person, to secure the payment of a sum, a part of which was a debt due to such third person by her husband, the purpose of the contract being to render the wife, in effect, a surety for the husband, his authorization will not remove the disability created by art. 2412 of the Civil Code, nor render the contract, so far as it accords a priority to the second mortgage, valid. C. C. 1784. *Cuny* v. *Brown*, 82.

19. Any obligation contracted by a married woman, by which she subjects her property, though but to a certain extent, to be seized and sold for the benefit of a creditor of her husband, is prohibited, though her obligation be not co-extensive with that of her husannd, and though she be not personally bound. C. C. 1784, 2412. *Ibid.*

20. A married woman, under the authorization of her husband, sold a tract of land, retaining a mortgage to secure the price, and agreed, without any pecuniary consideration personal to herself, to give priority to a mortgage to be executed by her vendee in favor of a third person, to secure a sum, part of which consisted of a debt due to the latter from her husband. In an action by the wife to rescind so much of the contract as gives priority to the second mortgage over her own: *Held*, that as the husband could not authorize his wife to make a contract by which she bound her property for his debt, the contract must be rescinded, so far as it accords a priority to the second mortgage, though the debt due by the husband, formed but a part of the sum for which the second mortgage was executed. *Per Curiam:* The consent of the husband cannot be divided: *non constat*, that he would have assented to the gratuitous surrender of his wife's right but upon condition of securing the debt due by him, nor that the second mortgagee would have accepted the mortgage without a priority as to the whole sum.
Ibid.—Re-hearing, 86.

21. The 27th section of the statute of 1st April, 1835, incorporating the Exchange and Banking Company of New Orleans, authorizing a "wife to bind herself jointly and *in solido* with her husband in all hypothecary contracts or obligations entered into by him in favor of that institution," does not empower a wife to bind herself with her husband, for the price of stock of the company, purchased in her name during the existence of the matrimonial community. *Per Curiam:* The provision in favor of the bank being in derogation of the general rule prescribed by art. 2412 of the Civil Code, must be strictly construed. It cannot be extended to cases not clearly within its purview.
Commissioners of Exchange and Banking Company v. *Bein*, 578.

ILLEGITIMATE CHILDREN.

The acknowledgment of an illegitimate child made by the parent in the regis-

ter of its baptism was sufficient, under the Code of 1808, book 1, tit. 7, art. 25. So under the present Code, art. 221.

Balot y Ripoll v. *Morina*, 552.

See SUCCESSIONS, 37, 38, 39, 40, 41.

INDICTMENT.

See SUMMARY PROCEEDINGS, 1.

INJUNCTION.

1. Where other sureties have been substituted, the original surety in an injunction bond may be examined as a witness for the plaintiff in injunction, though, by the statute of 25 March, 1831, § 3, it is declared that the surety on the bond shall be considered as a party to the suit, and be liable to be condemned, *in solido*, with the plaintiff, for damages and interest.

Williams v. *Planters Bank*, 125.

2. Where the value of property seized under a *fi. fa.* from a Parish Court, exceeds the sum to which the jurisdiction of the court is limited, an injunction may be obtained, by one claiming to be the owner of the property, from a District Court. The circumstances of the case make it a necessary exception to the provisions of arts. 397, 617, 629 of the Code of Practice.

Chapelle v. *Lemane*, 519.

3. A District Court cannot enjoin the execution of a judgment rendered by a Probate Court. *Nolan* v. *Babin*, 531.

INSOLVENCY.

1. A partnership is dissolved by the death of one of the partners, unless there be a stipulation to the contrary (C. C. 285,) but where the succession of a partner in a particular partnership is insolvent, and administered with the benefit of inventory, the partnership cannot be continued without the assent of all the creditors, though the articles of partnership have provided for its continuance. *Buard* v. *Lémée*, 243.

2. Defendants sued by the transferree of a note made by them, but not negotiable, pleaded their discharge under the insolvent laws. The schedule of the insolvents showed that the payee of the note was placed on it as a creditor for a sum exceeding the amount of the note. It was not proved that the note had been transferred to plaintiff, nor that defendants were notified of the transfer previously to filing their *bilan*. *Held*, that it was for the plaintiff to show that the amount for which the payee was placed on the *bilan* as a creditor did not include the note sued on; and there being no allegation that the defendants have acquired any property since their discharge, that there must be a judgment of nonsuit.

Vauquelin v. *Platet*, 381.

3. A creditor, whose claim has not been placed on the schedule of an insolvent, is not affected by the proceedings. *Ibid.*

4. Interest in favor of creditors holding mortgages upon property surrendered by an insolvent, ceases to run from the date of the sale of the property. *Collier* v. *His Creditors*, 398.

5. An authority to sell real property and to apply the proceeds in a particular way, unexecuted at the time of a *cessio bonorum* by the principal, is revoked thereby. *Barrett* v. *His Creditors*, 474.

6. A slave belonging to plaintiffs who were minors, having been sold by their father, another slave was purchased with the proceeds. The father having made a surrender of his property, the plaintiffs, by their under-tutor, sued to recover the slave so purchased: *Held*, That the title of the slave, which vested in the insolvent, passed to his creditors: and that, admitting that minors, where their property has been illegally sold, or where a purchase has been made with their funds, can claim either the money or the property, yet they can make this election only after coming of age, such election being equivalent to alienation of their estate or to a purchase of property. *Calmes* v. *Carruth.—Re-hearing*, 663.

See HUSBAND AND WIFE, 15. MINOR, 6.

INTEREST.

1. A stipulation in a note given for the price of property sold on a credit, that, if not paid at maturity, the amount for which the note was given shall bear the highest conventional interest from the date of the note till paid, is usurious. *Succession of Stafford*, 178.

2. A loan made in bank stock estimated above its specie value, and in depreciated bank notes at par, payable by the borrower in specie, where the sum stipulated to be paid by the borrower exceeds the actual specie value of the stock and notes, with the highest rate of conventional interest, is usurious. Proof that the borrower could pass off the stock and notes at the value fixed by the contract, in payment of debts due by him, does not render the transaction the less usurious. *Coxe* v. *Rowley*, 273.

3. Where, in sales of stock or depreciated currency, there is ground to suspect a disguised usurious loan, the mere form of the contract will be disregarded. The court will look to its essence, and endeavor to ascertain the true intent of the parties. Where usurious interest has been paid, it cannot be reclaimed. *Ibid.*

4. By the laws of Mississippi (stat. 25 June, 1822,) where an usurious rate of interest has been stipulated, the lender can recover only the principal. *Ibid.*

5. The holder of a note given by the purchaser for the price of property, secured by mortgage on other property, cannot recover interest from maturity, where the note was not protested. The mortgagee of property producing fruits is not entitled to legal interest, without a demand or an agreement to that effect, as an equivalent for the fruits received from the property. *Aliter*, as to the vendee of such property. C. C. 2531. *Collier* v. *His Creditors*, 399.

6. Interest in favor of creditors holding mortgages upon property surrendered by an insolvent, ceases to run from the date of the sale of the property. *Ibid.*

7. In an action to recover the proceeds of a note deposited as collateral security, plaintiff will be entitled to interest on the amount of the note from maturity, where the note was protested at maturity, and defendant acknowledged the receipt of the amount due on it. *Escurieux* v. *Chapdu*, 520.

INTERPRETATION.

In the interpretation of contracts the common intent of the parties, rather than the literal sense of the terms, should be sought; and where the intent is doubtful the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation. C. C. 1951. *Marcotte* v. *Coco*, 167.

See CONTRACTS, 11. HUSBAND AND WIFE, 2, 21.

INTERROGATORIES TO THIRD PERSONS UNDER A FI. FA.

See EVIDENCE, 42, 43.

JUDGMENT.

1. A judgment of nonsuit having been set aside, and a new trial allowed, at the succeeding term after the new trial had, and a judgment entered on the minutes for the plaintiff, the judge by mistake signed the judgment of nonsuit, which had been transcribed on the petition: *Held*, that the judgment of nonsuit, having been set aside within the time prescribed by law, was a nullity, and could not be reinstated by the subsequent inadvertent signature of the judge. *Hatch* v. *English*, 135.

2. A judgment of nonsuit will not support a plea of *res judicata*. *Rutledge* v. *Barnes*, 160.

3. The exception of *res judicata* can be pleaded for the first time before the Supreme Court, only where the facts necessary to sustain it appear from the record. C. P. 902. *Carpenter* v. *Beatty*, 540.

4. A judgment overruling, as coming too late, an exception by the defendant to the legality of an attachment, has the force of *res judicata* as to the surety in the attachment bond. *Irish* v. *Wright.—Re-hearing*, 571.

JUDGMENT BY DEFAULT.

1. Where one to whom interrogatories have been propounded under the 13th sect. of the act of 20 March, 1839, fails to answer within the delay fixed, such failure will, as in the case of a garnishee, be considered as a confession of his having property belonging to the debtor sufficient to satisfy the demand, and a final judgment may be rendered against him, on motion, without notice, for the amount of the demand, with interest and costs. C. P. 263. *Aliter*, where the party interrogated denies being indebted, and it

is attempted to disprove his answers; in such a case an issue is joined, and the party must have an opportunity of being heard before he can be condemned. *Poole* v. *Brooks*, 484.

2. A judgment by default taken on the fifth day after service of citation on the defendant, and afterwards confirmed, is illegal and null. C. P. 180, 310.
Arthur v. *Cochran*, 484.

JURISDICTION.

See COURTS. STATE, JURISDICTION OF.

JURY.

1. The jury are judges both of the law and the facts (C. P. 520); and though the judge must abstain from saying anything about the facts, or even recapitulating them so as to exercise any influence on the decision of the jury, it is his duty to charge them as to the law applicable to the case. C. P. 516, 517. *Spofford* v. *Pemberton*, 162.
2. Where the evidence is contradictory, and its effect depends in a great degree upon the credibility of the witnesses, a jury are the best judges of the weight to which it is entitled; and their verdict will not be disturbed, unless manifestly wrong. *Edwards* v. *Burroughs*, 171.
3. The verdict of a jury must be set aside when evidently wrong.
Marigny v. *Union Bank*, 283.
4. The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the district court of the domicil of the accused; and there must be a trial by jury. Acts 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1.
Turner v. *Walsh*, 383.
5. One sued as the maker of a note is entitled to a trial by jury, only where he has made the affidavit required by sect. 24 of the act of 20 March, 1839.
Hennen v. *Bourgeat*, 522.

LAFAYETTE, CITY OF.

The act of 22 March, 1843, ch. 66, which provides (sect. 5,) that the privilege granted to the city of Lafayette on property within its limits, for the proportion to which the owner is liable for any work done, or for taxes assessed thereon, shall only exist where an account thereof, duly certified, has been recorded in the office of the Recorder of Mortgages of the parish of Jefferson, does not apply to work done or taxes assessed before the date of that act; the right of the city to recover the cost of such work, or such taxes, must be governed by sects: 6 and 8 of the act of 12 March, 1836. The act of 1836, gives a privilege only for work done, and not for taxes; no law previous to the act of 1843 gave any privilege for the latter.
Mechanics and Traders Bank v. *Richardson*, 596.

LETTING AND HIRING.

1. A contract by which one party grants to the other the use of a building for a certain period, in consideration of a sum paid in cash, and the execution of notes by the latter for a further sum, payable at different periods, the written instrument describing it as one of lease, is not a contract of sale, but of lease.

Orleans Theatre Insurance Company v. *Lafferanderie*, 472.

2. Where a lessor, in an action for rent in arrear, causes the lease to be sold without observing the forms required by law, the lessee being thereby divested of possession by the tortious act of the lessor, will be released from any liability for rent accruing after the seizure. *Ibid.*

LEVÉE.

Where the police regulations of a parish require that notice in writing shall be given to resident proprietors personally, or at their domicil, of all work required to be done on any levée, the land on which such work is to be done, if the property of a resident proprietor, cannot be made liable, by a summary proceeding *in rem*, for the costs of such work, though executed in pursuance of an adjudication by the overseer of roads and levées, without proof of written notice, served personally, or at the domicil of the proprietor. The certificate of the inspector of roads and levées is not conclusive proof of notice, as against the proprietor; and parol evidence is admissible to prove that no sufficient notice was given. *Hamilton* v. *Michel*, 598.

MINOR.

1. A succession cannot be accepted for minor heirs, but with the benefit of inventory; and no portion of the estate can come into their possession, until it has been administered upon in due course of law, when, whatever may remain after the payment of the debts, will fall under the administration of their tutor. C. C. 1051. *Arthur* v. *Cochran*, 41.

2. Tutors of minor heirs are not entitled, *ex officio*, to administer successions accruing to their wards. They may claim the administration, where there are no beneficiary heirs of age, in preference to any other person; but they must give security and qualify as other administrators. C. C. 1034, 1037. *Ibid.*

3. Persons holding claims against a succession cannot sue the tutor of the minor heirs, and obtain a judgment against him for debts due by the deceased. Where no executor or administrator has qualified, they must provoke the appointment of an administrator, against whom, as the legal representative of the estate, they may institute suit. C. C. 1031 to 1060. C. P. 974 to 996. *Ibid.*

4. No tutorship exists during the marriage over the children born of it. C. C. 234. While the marriage exists, the father is the administrator of the estate of his minor children, and he is accountable for the property and re-

venues of the estate, the use of which he is not entitled to by law, and for the property only of such as the law gives him the usufruct of; his administration ceasing at the majority or emancipation of the children. C. C. 267, 239, 240. But the child has no legal mortgage or privilege on the property of the father as a security for his faithful administration during the marriage. C. C. 552, 553, 555, 3280 to 3288. *Cleaveland* v. *Sprowl*, 172.

5. Where, pending an action instituted by the natural tutor of certain minors to recover an amount due to them, the tutor dies, another tutor must be appointed, in whose name the proceedings may be carried on. The executor of the deceased tutor cannot represent the minors, nor receive, nor administer their property. In such a case, where the tutor dies pending an appeal, the action will be continued until the minors are properly represented, or come of age. *Mitchell* v. *Cooley*, 370.

6. Where a slave, inherited by minors from the succession of their mother, has been illegally sold by their natural tutor, they will not be allowed to ratify the sale, and claim the price from their tutor to the prejudice of other creditors of the latter. Their recourse is against the purchaser for the recovery of the slave. *Mercier* v. *Canonge*, 385.

7. Where, after the death of the wife, the surviving husband, being the natural tutor of their minor children, transfers stock in an insurance company, which belonged to the community of *acquests*, in payment of his individual debts, at a rate greatly exceeding its real value, he should not, where third persons are interested, be charged in the settlement of the community with the amount for which the stock was taken in payment, but with its real value at the time of the transfer, unless it be shown that the stock afterwards increased in value; and the burden of proving such increase is on the heirs of the wife. *Per Curiam:* The tutor is only bound to return to the minor the estimated value of those moveables which he cannot restore in kind. C. C. 333. *Ibid.*

8. Defendant, the natural tutor of his minor children, having rendered an account of his administration of the estate of his deceased wife, with whom there existed a community of *acquests*, charged himself with the revenues of the minors derived from property inherited from their mother and administered by him as tutor, but omitted to credit himself with the expenditures incurred subsequently to the dissolution of the community for their maintenance and education. It was proved, that the community and the surviving husband were insolvent, and that the latter had no property at the death of the wife. The property of the minors was sufficient to provide for their support and education. On an opposition by plaintiffs, who had obtained a judgment against defendant, their former tutor, for a balance due to them: *Held*, that defendant, as natural tutor of his children, was bound to account for the revenues of their property, after deducting the expenses of their support and education, according to their means and condition in life; that the alimony due from ascendants to descendants being due only in proportion to the wants of the one and the circumstances of the other, none was due by defendant to his children, (C. C. 245, 246, 247); and that the chil-

dren having an income sufficient for their support and education, plaintiffs, who were interested in the settlement of the tutorship, had a right to require that the support and education of the minors should be paid for out of the revenues of their property. *Ibid.*

9. A tutor being bound to procure medical assistance, when necessary, for the minor, the receipt of a physician for the amount of his fees for such services paid by the tutor, and admitted without opposition, is a sufficient voucher to entitle the latter to credit for the amount. *Per Curiam:* A tutor is not bound to procure evidence of the necessity for such services, where the amount paid is not large, and nothing authorizes the presumption that the payment was improperly made. *Richard* v. *Blanchard*, 524.

10. A natural tutor, though the law does not require him to be confirmed or appointed by the judge, must, like other tutors, take an oath before he can act as such. C. P. 949. And where an action has been commenced by a natural tutor before taking such oath, it will be dismissed on an exception to his want of authority. *Mitchell* v. *Cooley*, 636.

11. A slave belonging to plaintiffs who were minors having been sold by their father, another slave was purchased with the proceeds. The father having made a surrender of his property, the plaintiffs, by their under-tutor, sued to recover the slave so purchased: *Held*, that the title of the slave, which vested in the insolvent, passed to his creditors: and that, admitting that minors, where their property has been illegally sold, or where a purchase has been made with their funds, can claim either the money or the property, yet they can make this election only after coming of age, such election being equivalent to an alienation of their estate or to a purchase of property.
Calmes v. *Carruth.—Re-hearing*, 663.

See SUCCESSIONS, 28.

MORTGAGE.

1. The rights of creditors having privileges or mortgages are fixed at the time of the debtor's death. *Buard* v. *Lémée*, 243.

2. A., for the accommodation of B., drew a bill on the latter, in favor of C., which was accepted, but protested for non-payment by the payee. After the protest, B., to secure A. from any loss in consequence of his failure to pay the bill, gave the latter a mortgage on a plantation and slaves. C., having afterwards recovered judgment against A. and B. for the amount of the bill, assigned the judgment to D., who was subsequently, in consideration of releasing A., subrogated by the latter to his mortgage on the plantation and slaves. It was not proved that A. paid anything as drawer on the bill: *Held*, that the mortgage in favor of A., being intended only to indemnify him against any loss in consequence of the non-payment of the bill, and not to secure the payment of the bill itself, the contract was personal to A.; that the event, with a view to which it was executed not having occurred, the mortgage never took effect; and that consequently D. acquired nothing by the transfer of the rights of A. *Collier* v. *His Creditors*, 398.

8. The purchaser of property sold under execution subject to special mortgages, is entitled to retain out of the price the amount required to pay such mortgages. C. P. 679, 683. But this privilege being allowed merely to protect him from the danger of paying twice, where the debts secured by mortgage have been extinguished by prescription or otherwise, the purchaser can no longer retain the amount. The extinction by prescription, after the purchase, of a debt evidenced by a note and secured by mortgage, and which formed a part of the price, enures to the benefit of the mortgagor, not of the purchaser. *Per Curiam:* The debt due by note is prescribed by five years from its date, while the obligation of the purchaser to pay the price is only prescribed by ten years. *Ibid.*

4. Where the purchaser of property sold under execution, subject to a special mortgage given to secure the payment of a note, retains the amount of the mortgage as a part of the price, and subsequently makes a partial payment to the mortgagee, the payment will interrupt prescription both as to the original debtor and the purchaser, being made in discharge of the former, and with his implied assent. *Ibid.*

5. The holder of a note given by the purchaser for the price of property, secured by mortgage on other property, cannot recover interest from maturity, where the note was not protested. The mortgagee of property producing fruits is not entitled to legal interest, without a demand or an agreement to that effect, as an equivalent for the fruits received from the property. *Aliter*, as to the vendee of such property. C. C. 2531. *Ibid.*

6. Interest in favor of creditors holding mortgages upon property surrendered by an insolvent, ceases to run from the date of the sale of the property. *Ibid.*

7. Where one of the heirs mortgages his undivided share in certain immoveables belonging to the succession, and they are subsequently sold under an order of the Probate Court, for the purposes of liquidating and partitioning the succession, the proceeds of the sale of the share so mortgaged will stand in place of the property, and be subject in the hands of the administrator, to the claims of the mortgage creditor, as if no sale had been made. Act 27 March, 1843, s. 2. *Succession of Pigneguy*, 450.

See MINOR, 4. PRIVILEGE, 3.

MOVEABLES.

Personal property has no other *situs* than the domicil of the owner. *Succession of Packwood.—Re-hearing*, 366.

NEW ORLEANS GAS LIGHT AND BANKING COMPANY.

1. The act of 1 April, 1835, incorporating the New Orleans Gas Light and Banking Company, having conceded to the company the exclusive privilege of vending gas in the cities of New Orleans and Lafayette (§ 36,)

during a certain period, the company is bound to supply gas to all persons who may call for it, on their paying or offering to pay therefor. The company have no right to require the owner of a building to pay an amount due by a former owner for gas, as the condition of supplying him.

Gas Light and Banking Company v. *Paulding*, 378.

2. A promise by the owner of a building to pay an amount due by a former owner for gas, made in order to obtain gas for his own use, and in consequence of a threat, by the company having the exclusive privilege of vending gas, that unless the amount were paid, no gas should be supplied, is void. C. C. 1853. *Ibid.*

NEW ORLEANS, MASTER AND WARDENS OF PORT OF.

Plaintiff, who had been appointed a port warden in place of defendant, was enjoined from exercising the functions of the office, on the ground that his appointment was illegal. Pending the action, defendant discharged the duties and received the fees of the office. The injunction was dissolved, and plaintiff declared to have been legally appointed. Plaintiff did not take the oath required to qualify him to act as a port warden till after the dissolution of the injunction. In an action on the injunction bond, for damages: *Held*, that plaintiff had no right to act as a port warden until qualified by taking the oath of office; that the injunction did not restrain him from taking the oath; and that defendant, having a right to act until plaintiff had qualified, no damages can be recovered by the latter. *Thompson* v. *Nicholson*, 326.

NONSUIT.

Where an attorney is appointed to represent absent defendants, and on the same day an answer is filed by him and the suit dismissed, the proceedings are irregular, and, on motion by plaintiff, the suit must be reinstated. *Per Curiam:* As soon as an answer has been filed, the clerk must place the case on the docket, that it may be called in its turn and a day fixed for its trial (C. P. 463); and the court can order a nonsuit without the consent of the plaintiff, only where the case has been set for trial, and the plaintiff fails to appear, personally or by attorney, on the day fixed. *Ibid.* 536.

Walton v. *Commercial and Railroad Bank*, 99.

OFFENCES AND QUASI-OFFENCES.

1. Where slaves have been seized under a *fi. fa.*, and the sheriff, with the consent of the plaintiff in execution, leaves them with the debtor until the day of sale, they will be considered as in the legal custody of the sheriff; and one proved to have aided the debtor in removing them beyond the limits of the state, with a view to defraud his creditors, will be responsible to the latter to the extent of the injury they may sustain in consequence, and the full value of the slaves will be the measure of damages, if the debt amounts

to so much. C. C. 2294, 2295, 2304. Testimony that will satisfy a jury of the guilt of the defendant is sufficient to maintain the action; and every fact proved, calculated to produce this conviction, should be considered, in coming to a conclusion as to his knowledge of the fraud.

Smith v. *Berwick*, 20.

2. Every man is responsible for injury done to another, though occasioned by negligence or imprudence. C. C. 2295. *Ibid.*

3. An action may be maintained by a creditor against a third person for the injury done to him by the latter, in aiding his debtor to remove his property beyond the limits of the state, though a suit be pending, by the creditors against the debtor, in the country to which the property was removed, for the purpose of subjecting it to the payment of the debt. But the defendant, on proving that any thing has been made in the action against the debtor, will be entitled to have the amount deducted from the sum for which he would otherwise be liable. *Ibid.*

4. The trouble and expense to which a party is subjected in establishing his title to property of which the defendant attempted fraudulently to dispossess him, form a good ground for estimating the damages he is entitled to recover. *Copley* v. *Berry*, 79.

5. Damages for an illegal arrest, may be recovered under art. 2294 of the Civil Code, which declares that every man shall be bound to repair any damage done, by his fault, to another. *Spofford* v. *Pemberton*, 162.

6. Plaintiff, who had been appointed a port warden in place of defendant, was enjoined from exercising the functions of the office, on the ground that his appointment was illegal. Pending the action, defendant discharged the duties and received the fees of the office. The injunction was dissolved, and the plaintiff declared to have been legally appointed. Plaintiff did not take the oath required to qualify him to act as a port warden till after the dissolution of the injunction. In an action on the injunction bond, for damages: *Held*, that plaintiff had no right to act as a port warden until qualified by taking the oath of office; that the injunction did not restrain him from taking the oath; and that defendant, having a right to act until plaintiff had qualified, no damages can be recovered by the latter.

Thompson v. *Nicholson*, 326.

7. The owner of land illegally taken for public use by the authorities of a city, may recover its value at the time it was taken, in an action for damages. On the receipt of the damages the property will cease to belong to the plaintiff. *Lawrence* v. *Second Municipality of New Orleans*, 453.

8. Where a lessor, in an action for rent in arrear, causes the lease to be sold without observing the forms required by law, the lessee being thereby divested of possession by the tortious act of the lessor, will be released from any liability for rent accruing after the seizure.

Orleans Theatre Insurance Company v. *Lafferanderie*, 472.

9. One whose property has been seized and sold, after notice of his title, un-

der an execution against a third person, may recover not only the value of the property, but damages for the illegal seizure and sale.

Dutton v. *Rousseau*, 534.

10. An inspector of elections who has illegally and maliciously prevented one from voting, will be responsible to the latter in damages.

Bridge v. *Oakey*, 638.

11. Plaintiff having commenced an action against a city corporation for damages for oppressive and illegal proceedings on the part of the President and Council, in which she alleged that the latter, though acting officially, were really actuated by private interest and malice, obtained an injunction restraining them from entering upon and committing any trespass on her property. Defendants disregarded the injunction, and demolished a portion of a building forming part of the property. The jury returned a verdict in favor of plaintiff for an amount greatly exceeding the actual damage to the property, and there was judgment accordingly. On appeal: *Held*, that the acts of the President and Council having been alleged to be wilful and malicious, plaintiff cannot recover vindictive damages against the corporation, but only an indemnity for the loss actually sustained by her.

McGary v. *City of Lafayette.—Re-hearing*, 674.

See SEQUESTRATION.

PARAPHERNAL PROPERTY.

See HUSBAND AND WIFE, I.

PARTNERSHIP.

1. An unincorporated association of individuals formed for the purpose of dealing in exchange, is a commercial partnership within the terms of art. 2795 of the Civil Code; and the members are responsible, *in solido*, for the debts of the society. *English* v. *Wall*, 132.

2. The partners in a particular partnership are not bound *in solido*, for the debts of the firm, but each for his share only, calculated in proportion to the number of the partners (C. C. 2844); nor can one partner bind the rest, unless empowered to do so specially, or by the articles of partnership. C. C. 2843. *Buard* v. *Lémée*, 243.

3. A partnership is dissolved by the death of one of the partners, unless there be a stipulation to the contrary (C. C. 285,) but where the succession of a partner in a particular partnership is insolvent, and administered with the benefit of inventory, the partnership cannot be continued without the assent of all the creditors, though the articles of partnership have provided for its continuance. *Ibid.*

4. After the dissolution of a partnership none of the members can bind the rest, nor the partnership, for the payment of a debt which has been prescribed. *Ibid.*

5. A transfer of a judgment belonging to a partnership in a state of liquida-

tion, made by an agent authorized to settle its affairs, but not expressly empowered to sell or transfer such property, must be declared void, unless it be shown that the transfer, being for the settlement, or payment of a partnership debt, was for the benefit of the partnership, and necessary to its liquidation, and that due notice thereof was given to the judgment debtor.

Smith v. *McMicken*, 653.

PARTIES.

See APPEAL, IV. EVIDENCE, XIV. PLEADING, I.

PAYMENT.

1. Where a creditor receives from his debtor a draft on a third person, as collateral security, the proceeds to be applied to the payment of his debt, he acts, so long as he holds the draft, as the agent of his debtor, and is responsible not only for unfaithfulness, but for faults or neglect; (C. C. 2971, 2972;) and where, through the neglect of the creditor, in giving incorrect instructions to the notary by whom the draft was protested, or in not furnishing him with the means of obtaining correct information as to the residence of the endorser, the latter, the only solvent party to the bill, is discharged, the debtor will be entitled to credit for the amount of the bill.

Cammack v. *Priestly*, 423.

2. A tax collector cannot be required to receive in payment of taxes, *coupons* or warrants for the semi-annual interest due on certain bonds of the State, executed in favor of a bank, though the State be bound to pay the interest on the bonds, where the party taxed does not show himself to be the owner of the bonds, and the *coupons* or warrants purport to have been issued, and to be payable by the bank, and the laws authorizing the issuing of the bonds in favor of the bank, give it no power to issue such *coupons* or warrants in the name of the State. *Roman* v. *Ory*, 517.

3. A husband has authority to receive whatever may be due to his wife on account of her paraphernal property, when such property is not proved to be under her sole and separate administration; and a payment to him will discharge the debtor. C. C. 2362. *Richard* v. *Blanchard*, 524.

PETITORY ACTION.

See EVIDENCE, 54, 55. PLEADING, 5, 6.

PLEADING.

I. *Parties to Actions.*
II. *Actions, where to be brought.*
III. *Petition and Amendments thereto.*
IV. *Exceptions and Answer.*
V. *Reconvention.*
VI. *Interrogatories to a Party.*

VII. *Proceedings against an Attorney to Cancel his License.*
VIII. *Proceedings for the Settlement of Successions.*

I. *Parties to Actions.*

1. An action may be maintained against an absentee, though not personally cited, and though no property of his have been attached, where a curator, *ad hoc*, has been appointed to represent him. *Coply* v. *Berry*, 79.

2. The provision of art. 43 of the Code of Practice, that a petitory action must be brought against the person in actual possession of the immoveable does not contemplate that the person sued should have the right of possession. It is enough that he be the actual occupant.

Dreux v. *Kennedy*, 489.

3. Plaintiffs having instituted a petitory action against defendants to recover lands alleged to be in their possession, the latter excepted to answering the petition, and prayed for its dismissal, averring that the property is in the possession of the United States, a branch Mint having been erected thereon; that they are merely officers of the Mint, and are not in possession of the premises, and have no authority to represent the United States; and that this action is an attempt to effect indirectly what plaintiffs could not do directly: *Held*, that the exception should be overruled. *Per Curiam:* Where the party in possession, sued in a petitory action, points out the owner under whom he holds, he is bound to defend the action, if such owner do not live within the State or is not represented therein, or if such proprietor, lessor or principal be the United States, against whom no direct action can be brought. *Ibid.*

4. Two distinct actions having been commenced by different plaintiffs against the defendant, attachments were levied at the same time on the same property, which were released on the execution of a single bond for the two cases, conditioned that if said defendants shall satisfy such judgments as may be rendered against them in the suits pending, the said obligations shall be void, otherwise remain in full force, &c. The claim of each plaintiff exceeded the amount of the bond, which was silent as to their respective shares in it. On a rule by one of the plaintiffs against the sureties on the bond to show cause why they should not satisfy a judgment obtained by him, and exception by the sureties that plaintiff, being a joint obligee, could not recover against them without joining his co-obligee; *Held*, that the bond containing distinct obligations to perform different things in favor of different persons, each obligee has a distinct and separate remedy, (C. C. 2074, 2076); but that where one plaintiff proceeds against the sureties, before any decision on the claim of the other, he can recover only one-half of the amount of the bond, reserving his right to recover the balance in case the plaintiff in the other action shall be defeated. *Irish* v. *Wright*, 563.

5. Under the statutes of 9 March, 1827, and 17 March, 1828, authorizing certain inhabitants of the parish of Iberville to raise a sum of money by lottery, a majority of the commissioners are empowered to sue, for the be-

ne fit of the inhabitants, for money received by one of the commissioners, and converted to his own use. In such an action the commissioners cannot be required to name the inhabitants represented by them; nor will the objection that the plaintiffs had not given bond, as required by those statutes, avail a defendant who had also failed to give bond as a commissioner, and withheld money received by him. *Potts* v. *Camp*, 646.

See BANK, 5.

II. *Actions, Where to be brought.*

6. Where a party sues to annul a conveyance of land which he alleges was fraudulently obtained, to his prejudice as a previous purchaser from the same vendors, to the knowledge of one of the defendants who acted as agent of the other, and prays to be declared the owner of the land, and for damages, the action will not be dismissed on an exception that it is brought in a parish which was neither the residence of the defendants, nor that in which the land was situated. *Per Curiam:* The action is rather a personal one, to obtain redress for a fraud, the effect of which was to deprive the plaintiff of a right previously acquired, than a real one to recover the land itself in the adverse possession of defendants; and though the annulling of the contract would confirm, as against the defendants, plaintiff's title to the land, the gist of the action is the cancelling of a contract. *Copley* v. *Berry*, 79.

7. Courts of probate are without jurisdiction of an action against a curatrix to render her personally liable for the debts of the succession, for mal-administration; or to determine whether real property, which she has not included in the inventory, but claims as her own, belongs to the succession, or not. *Per Curiam:* It is not enough to allege that a defendant is curatrix of an estate, to give jurisdiction to the probate court of a matter not in itself of probate jurisdiction. Even a suit on the bond of a curatrix against her and her sureties individually, must be brought before a court of ordinary jurisdiction, nor can a court of probate inquire directly into the title to real estate. *Hemken* v. *Ludewig*, 188.

8. A demand that an executrix be ordered to account and file a *tableau* of distribution, cannot be cumulated, in an action before a probate court, with a demand against the defendant to render her individually liable for mal-administration. The demands are contrary to each other, and cannot be prosecuted together; and a probate court is without jurisdiction as to the latter. *Ibid.*

III. *Petition and Amendments thereto.*

9. A petition signed by the plaintiff's attorneys, in their own names, without describing themselves as attorneys for the plaintiff, is sufficient. C. P. 172. *Merrell* v. *Lattimore*, 138.

10. Where a petition is excepted to for the omission of a mere matter of form, the plaintiff may amend *instanter*, and the defendant cannot require time to

answer such amendment, nor require that the amended petition should be served upon him. *Ibid.*

11. Amendments to a petition may be allowed as well before as after issue joined. *Ibid.*

12. Where plaintiff sues on a note as having been transferred to him, and the note, which is annexed to and prayed to be taken as a part of the petition, shows that it was transferred to the plaintiff and another person, and there is no evidence that plaintiff afterwards acquired the whole interest in it, the variance between the *allegata* and *probata* will be fatal.

Taylor v. *Normand*, 240.

13. A plaintiff may introduce any evidence necessary to disprove or rebut the allegations made by the defendant in his answer, though the facts offered to be proved by the former were not alleged in the petition. No replication being allowed, all new facts alleged in the answer are considered as denied. C. P. 329. *Riley* v. *Wilcox*, 648.

14. Where, in an action for wages as an overseer, plaintiff alleges that he was engaged for one year from the first of January, and that he performed the duties of an overseer from that day, he will not be allowed to show that, although he was engaged from that day it was understood between the contracting parties, that he was not to take full charge of the plantation till the 6th of the month. If the contract was subject to such a condition, it should have been alleged. *Ibid.*

See 8, *supra.*

IV. *Exceptions and Answer.*

15. After the plea of the general issue, and the admission of evidence, without objection, going to show the real character of the transaction, it is too late to object that the petition sets up contradictory grounds of action, and prays for remedies inconsistent with each other. *Cuny* v. *Brown*, 82.

16. Though a creditor cannot treat a conveyance of real estate by his debtor, alleged to be fraudulent, as null, and seize under a *fi. fa.* the property in the hands of his vendee; yet if the latter do not enjoin the proceedings, but permits the sheriff to seize and sell the property as still belonging to his vendor, and afterwards sues the purchaser at the sheriff's sale to annul the sale and cause himself to be declared the owner of the property, the creditor, cited in warranty, may plead by way of exception, whatever he might have urged in a direct action to annul the first sale.

Fisher v. *Moore*, 95.

17. All exceptions to form are considered as waived where the parties proceed to trial on the merits, without requiring any decision on the exceptions. *St. Romain* v. *Robeson*, 194.

18. Plaintiff having sued defendants, a banking company, on notes issued by them, certain persons intervened alleging that defendants had assigned to them their whole property for the benefit of their creditors; and plaintiff, in answer to the petition of intervention, averred that the assignment was

illegal. The intervenors having pleaded the prescription of one year against revocatory actions: *Held*, that the assignees, by seeking to avail themselves of the assignment by way of intervention, became thereby plaintiffs or actors, and that the illegality being set up by way of exception, prescription cannot be pleaded, under the rule *Quæ temporalia*, &c.

Marshall v. *Grand Gulf Railroad and Banking Company*, 198.

19. Though a direct action to annul a contract be prescribed, its nullity may be pleaded by the party against whom it is sought to be enforced, at any time, by way of exception. *Ibid.*

20. Where an absentee against whom an action had been commenced by attachment excepted to the attachment, but on the exception being overruled pleaded to the merits, he will be entitled, if the exception was erroneously overruled, to require that the action be dismissed. The benefit of his exception is not waived by his answer made under the order of the court.

Grove v. *Harvey—Re-hearing*, 226.

21. Whenever a remedy may be sought by action, the party entitled thereto, may avail himself of it by way of exception. C. C. 2042. C. P. 20.

Orleans Theatre Insurance Company v. *Lafferanderie*, 472.

22. Plaintiffs, commissioners for the liquidation of a bank, having sued the cashier and his sureties in his official bond, for damages for misconduct of the cashier, instituted, pending the first suit, a second action against the cashier, president, and directors for malfeasance. The demand in the first case was limited to the amount of the official bond of the cashier. On an exception by the cashier of *lis pendens*: *Held*, that the action cannot be divided, and a part of the damages sued for in one case, and a part in the other; and that the cause of action being the same, though the amounts demanded are not, the exception should be sustained. C. P. 335.

Hemken v. *Ludewig*, 188.

V. *Reconvention.*

23. Where the holder of a note, with whom a draft had been deposited by the debtor, as collateral security, becomes liable to the latter for the amount in consequence of his neglect to protest the draft, the damages sustained by the debtor may be pleaded in reconvention to an action on the note by the holder, (C. P. 375,) or by the syndic of his creditors, where the holder had become liable by his neglect to protest the draft before his declared insolvency. *Cammack* v. *Priestly*, 423.

24. It is not necessary that a demand pleaded in reconvention should, in all cases, be liquidated. *Ibid.*

25. One who has received money as a commissioner under a statute providing for the raising and disbursement of a certain sum in the improvement of a portion of a parish, and has expended a part thereof for the purposes contemplated by the act, though without authority from the board, under whose direction the money was to be disbursed, and without complying with other formalities prescribed by the act, may, in an action against him for the amount received, claim an allowance for the value of the work paid for by

him. He cannot be forced to resort to a separate action to obtain the credits to which he is equitably entitled. *Potts* v. *Camp*, 646.

VI. *Interrogatories to a Party.*

26. Interrogatories propounded to a bank as a party to an action, should be answered by the president of the bank; answers by the cashier alone, are insufficient. *Commercial Bank* v. *Guice*, 181.

VII. *Proceedings against an Attorney to Cancel his License.*

27. The license of an attorney at law cannot be withdrawn or annulled, unless on *conviction* in the manner prescribed by the act of 27 March, 1823. The proceedings must be by information before the district court of the domicil of the accused; and there must be a trial by jury. Acts 31 March, 1808, s. 6. 27 March, 1823, s. 3. 22 March, 1826, s. 1.

Turner v *Walsh*, 383.

VIII. *Proceedings for the Settlement of Successions.*

28. Where an administrator has paid claims against a succession which were barred by prescription, or for which, for any other cause, the estate was not liable, the allowance of such payments must be opposed by a written opposition, in the court of the first instance. C. P. 1004. Credits claimed for payments not opposed below, cannot be objected to on appeal, though resisted on the ground that the debts so paid were prescribed. Art. 3427 of the Civil Code, which declares that prescription may be pleaded in every stage of the cause, even after appeal, does not apply to such a case.

Succession of Blakey, 155.

29. One not shown to be a creditor of a succession cannot oppose the allowance of claims set up by others. *Succession of Floyd*, 197.

30. The creditors of a succession have no right to intervene in proceedings by the heirs to compel an administrator to render his accounts. Such proceedings cannot prejudice their claims against the estate.

Succession of Thomas, 215.

31. A widow, who has accepted the community, is entitled to one-half of the balance found due after a full administration and the payment of all the debts of the estate; but she cannot by a petition to the Court of Probates, require the administrator of her husband's estate to account, and recover judgment for a specific sum against him, with interest from judicial demand, and cause herself to be placed on the *tableau* of distribution for such sum as if she were a creditor of the estate. An administrator owes but one account to the legal representatives of the deceased; and the judgment of the court, rendered contradictorily with the heirs and the widow, on a motion to homologate the account rendered by the administrator, should ascertain the balance due to the estate. Such balance bears interest at five per cent from the time of rendering the account, and the widow is entitled to one-half of it. *Ibid.*

See 7, 8, *supra*.

PORT WARDENS.

See NEW ORLEANS, MASTER AND WARDENS OF PORT OF.

POSSESSION.

1. Where the owner of a plantation, whose title has been divested by a sheriff's sale, is retained by the purchaser on the plantation as a manager, his possession becomes that of his employer. C. C. 3396, 3398, 3401.

Whiting v. *Prentice*, 141.

2. Where a vendor sells the property in a slave, reserving the usufruct during his life, his possession being based upon the reservation of usufruct, cannot support a plea of prescription. One cannot prescribe against his own title, nor change, by his own act, the nature and origin of his possession. C. C. 3480. *Hood* v. *Segrest*, 210.

3. A possessor in bad faith cannot claim any thing for improvements made by him on the premises, where their value does not exceed that of the fruits and revenues received by him. Such a possessor has no claim to the fruits and revenues. C. C. 3416. *Williams* v. *Booker.—Re-hearing*, 256.

PRESCRIPTION.

I. *Prescription by which Property is Acquired.*
II. *Prescription which Releases from Debt.*
III. *Interruption or Suspension of Prescription.*

I. *Prescription by which Property is Acquired.*

1. Property in real estate is acquired by public continuous possession, under the title of owner, for thirty years. *Broussard* v. *Gonsoulin*, 1.

2. Where a vendor sells the property in a slave, reserving the usufruct during his life, his possession being based upon the reservation of usufruct, cannot support a plea of prescription. One cannot prescribe against his own title, nor change, by his own act, the nature and origin of his possession. C. C. 3480. *Hood* v. *Segrest*, 210.

3. The lapse of the time necessary to prescribe, vests a right in the party in whose favor it has run. *Aliter*, where but a part of the time has elapsed. No right is vested but where the prescription is completed; until then it may be destroyed by law, or be suspended, or interrupted by circumstances.

Calvit v. *Mulhollan.—Re-hearing*, 266.

4. One who possesses personal property, not as owner, but as agent, can acquire no title by prescription, even as to third persons.

Dutton v. *Rousseau*, 266.

II. *Prescription which Releases from Debt.*

5. The prescription of five years, established by art 3505 of the Civil Code,

does not apply to a promissory note not transferrable by endorsement or delivery. Such a note is prescribed by ten years. C. C. 3508.

Whiting v. *Prentice*, 141.

6. The prescription of one year established by art. 3499 of the Civil Code, does not apply to the claim of one who has paid for another bills due by him to an inn-keeper. Such a claim is only prescribed by ten years. C. C. 3508. *Owen* v. *Holmes*, 148.

7. The prescription of three years established by art. 3503 of the Civil Code against actions for the recovery of money lent, does not apply to the claim of one who has paid the bills or obligations of another, at his request, either in money or by drafts on a third person. Such an action is only prescribed by ten years. C. C. 3508. *Ibid.*

8. A promissory note, not transferrable by endorsement or delivery, is not prescribed by five years. C. C. 3505. *Ibid.*

9. Where one pays the debt of another at his request, the action to recover the money advanced is not prescribed by the prescription applicable to the debt itself. The action to recover the amount is a personal one, which is only prescribed by ten years. C. C. 3508. *Ibid.*

10. Prescription does not run against the right which an administrator has to claim credit for debts of the succession paid by him. The relation of debtor and creditor does not properly exist between him and the estate, until after rendering his accounts, a balance has been struck for or against him. Whenever he may file his account, he will be entitled to credit for all sums legally paid for the estate, whatever may be the date of the payments.

Succession of Blakey, 155.

11. Where an administrator has paid claims against a succession which were barred by prescription, or for which, for any other cause, the estate was not liable, the allowance of such payments must be opposed by a written opposition, in the court of the first instance. C. P. 1004. Credits claimed for payments not opposed below, cannot be objected to on appeal, though resisted on the ground that the debts so paid were prescribed. Art. 3427 of the Civil Code, which declares that prescription may be pleaded in every stage of the cause, even after appeal, does not apply to such a case. *Ibid.*

12. Plaintiff having sued defendants, a banking company, on notes issued by them, certain persons intervened, alleging that defendants had assigned to them their whole property for the benefit of their creditors; and plaintiff, in answer to the petition of intervention, averred that the assignment was illegal. The intervenors having pleaded the prescription of one year against revocatory actions: *Held*, that the assignees, by seeking to avail themselves of the assignment by way of intervention, became thereby plaintiffs or actors, and that the illegality being set up by way of exception, prescription cannot be pleaded, under the rule *Quæ temporalia*, &c.

Marshall v. *Grand Gulf Railroad and Banking Company*, 198.

13. Though a direct action to annul a contract be prescribed, its nullity may be pleaded by the party against whom it is sought to be enforced, at any time, by way of exception. *Ibid.*

14. After the dissolution of a partnership, none of the members can bind the the rest, nor the partnership, for the payment of a debt which has been prescribed. *Buard* v. *Lémée*, 243.

15. The purchaser of property sold under execution subject to special mortgages, is entitled to retain out of the price the amount required to pay such mortgages. C. P. 679, 683. But this privilege being allowed merely to protect him from the danger of paying twice, where the debts secured by mortgage have been extinguished by prescription or otherwise, the purchaser can no longer retain the amount. The extinction by prescription, after the purchase, of a debt evidenced by a note and secured by mortgage, and which formed a part of the price, enures to the benefit of the mortgagor, not of the purchaser. *Per Curiam:* The debt due by note is prescribed by five years from its date, while the obligation of the purchaser to pay the price is only prescribed by ten years. *Collier* v. *His Creditors*, 398.

16. The provision of art. 1176 of the Civil Code, which gives an action to the creditors of a succession, who present themselves for the first time after the distribution of the assets among the other creditors, to compel the latter to refund so much as may be necessary to give the rest the proportion they would have been entitled to receive, had they presented themselves at the time of the payment of the debts, can only avail those creditors whose claims have not been prescribed before the expiration of the three years within which such an action may be brought. *Succession of Dubreuil*, 507.

III. *Interruption or Suspension of Prescription.*

17. An acknowledgment of the debt by the maker of a note does not interrupt prescription as to the endorser. They are not debtors *in solido* in the meaning of arts. 2092, 3517 of the Civil Code, which declare that a suit brought against one of the debtors *in solido*, or his acknowledgment of the debt, interrupts prescription as to the rest. *Per Curiam:* The maker and endorser do not bind themselves at the same time, or by the same contract, but by different and successive contracts, without any privity or reciprocity. Debtors *in solido* are, among themselves, liable each only for his portion (C. C. 2099); if one pays the whole debt, he can claim from each of the rest only his portion; and if one be insolvent, his portion must be divided among the solvent obligors. C. C. 2100. *Aliter*, as to the maker and endorsers of a note or bill; each endorsement is a distinct contract; if payment be made by the maker, or first endorser, neither can claim anything from subsequent endorsers; while, if it be the last endorser who pays, he may claim the whole amount from any previous endorser or the maker; and each endorser has the same right against every previous endorser and the maker. *Jacobs* v. *Williams*, 183.

18. An accommodation endorser of a note is not a surety in the meaning of art. 3518 of the Civil Code, which declares, that a citation served on the principal debtor, or his acknowledgment, interrupts prescription as to the surety. *Per Curiam:* The suretyship between an accommodation endorser and the maker of a note, exists only as between themselves; as to the

holder, their liability depends on the rules applicable to negotiable instruments in general. *Ibid.*

19. The words *joint debtor* in art. 3517 of the Civil Code, were inserted in the English text of that article, through an error of the translator or transcriber. The article must be interpreted as applying to debtors *in solido*.

Huard v. *Lénée*, 243.

20. The acknowledgment of a debt by one joint debtor, or a suit brought by or against one of several joint debtors, does not interrupt prescription as to the rest. *Ibid.*

21. To interrupt or renounce prescription, the acknowledgment must be of a particular, specific debt. Proof that the party acknowledged in conversations with the witnesses, that he was largely indebted to the plaintiff, is insufficient. *Ibid.*

22. Prescription ran against a vacant estate, under the Code of 1808. Book 3, tit. 20, art. 62. The law is the same under the Code of 1825. Art. 3492. *Calvit* v. *Mulhollan*, 258.

23. Plaintiff claimed, as heirs of their mother, one-half of a tract of land belonging to the community of *acquêts*, sold by the husband after the death of the wife. The sale was made while the Code of 1808 was in force. The husband after the wife's death became the natural tutor of the plaintiffs, then minors, and retained the community property in his possession, but took no steps to open the succession of the wife, and no one claimed possession of it either as heir or under any other title. Defendants pleaded the prescription of ten years. *Held*, that the succession being, according to the Code of 1808, a vacant one, prescription ran against the estate, and in favor of the defendants from the date of the sale till the promulgation of the new Code on the 20th June, 1825; that after its promulgation the succession ceased to be vacant, the heirs becoming from that moment seized of it; that no prescription could run against such of the heirs as were then minors; and that to ascertain whether the action of any heir was prescribed by the lapse of ten years, the time between the sale and the promulgation of the Code of 1825, should be added to that between the majority of the heir and the institution of the suit. C. C. 934 to 939, 3488, 3492. *Ibid.*

24. Where the purchaser of property sold under execution, subject to a special mortgage given to secure the payment of a note, retains the amount of the mortgage as a part of the price, and subsequently makes a partial payment to the mortagee, the payment will interrupt prescription both as to the original debtor and the purchaser, being made in discharge of the former, and with his implied assent. *Collier* v. *His Creditors*, 398.

25. Prescription running in favor of a debtor is not suspended by his death. C. C. 3487. The rule *contra non valentem, &c.*, does not apply to the creditors, who may interrupt prescription, by presenting their claims to the administrator, and obtaining his acknowledgment thereof, and an order from the judge classing them among the acknowledged debts of the succession, or, in case of the refusal of the administrator to acknowledge them, by suit. C. P. 984, 985, 986. *Succession of Dubreuil*, 507.

26. The acknowledgment of an administrator of a claim against a succession, unaccompanied by an order of the judge directing it to be ranked among the acknowledged debts of the succession, merely interrupts prescription, which will commence to run anew from that time; and where sufficient time subsequently elapses before any further action on the part of the creditor, the claim will be prescribed. *Ibid.*—*Re-hearing*, 511.

PRESUMPTION.

See EVIDENCE, II.

PRISON-BOUNDS BOND.

At the time of executing a prison-bounds bond by a debtor arrested under final process, the prison-limits were, under the statute of 25 February, 1837, coextensive with the boundary of the parish in which he resided. A new parish was afterwards formed from that portion of the old in which the debtor resided, and from part of a contiguous parish, and the seat of justice of the new parish established at a place never within the limits of the old. In an action against the surety on the bond, it was proved that the debtor had gone to the seat of justice of the new parish: *Held*, that the statute creating the new parish cannot have rendered the condition of the debtor more onerous by compelling him to remain within the restricted limits of the old parish; that, by the creation of the new parish, the debtor was either released altogether, or became a prisoner, in the custody of his bail, within the limits of the new parish; and consequently, that the bond was not forfeited. *Guion* v. *Ford*, 123.

PRIVILEGE.

1. No tutorship exists during the marriage over the children born of it. C. C. 234. While the marriage exists, the father is the administrator of the estate of his minor children, and he is accountable for the property and revenues of the estate, the use of which he is not entitled to by law, and for the property only of such as the law gives him the usufruct of: his administration ceasing at the majority or emancipation of the children. C. C. 267, 239, 240. But the child has no legal mortgage or privilege on the property of the father as a security for his faithful administration during the marriage. C. C. 552, 553, 555, 3280 to 3288.

Cleveland v. *Sprowl*, 172.

2. The rights of creditors having privileges or mortgages are fixed at the time of the debtor's death. *Buard* v. *Lémée*, 243.

3. The vendor of a tract of land received from the purchaser his note for the price, endorsed by a third person. A mortgage was reserved by the notarial act of sale to secure the payment of the note, which was duly *paraphed* by the notary. The act was recorded in the mortgage office, and on the same day the vendor wrote on the face of the record, that "the mortgage is hereby released, without, however, acknowledging payment of the price of

the purchase money." The release was gratuitous, and no third person had acquired any rights under it. In an action by plaintiffs, who had discounted the note, which was protested for non-payment, against the endorsers and the maker, claiming the vendor's privilege: *Held*, that there is a difference between a special mortgage reserved to secure the price of the thing sold and the vendor's privilege: that the release of the mortgage did not extinguish the privilege, which resulted from the terms of the act; and that the parties cannot avail themselves of the release of the mortgage, to the prejudice of plaintiffs, who took the note on the faith of their signatures and endorsements, and with reference to an act which showed a sale on credit and an express acknowledgment, accompanying the release, that the price had not been paid. *Citizens Bank* v. *Cuny*, 279.

4. Where the proprietor of a plantation on which an overseer is employed by the year, sells the plantation, and the overseer remains in the employment of the purchaser for the rest of the year, receiving his wages for that period from the latter, and continues with the purchaser for the succeeding year, he has no right or privilege on the crop of the second year, made by the purchaser after the sale, for wages due to him by the former proprietor for the preceding year. C. C. 3184, § 1. *Welsh* v. *Shields*, 527.
5. An overseer being entitled to one-fourth of the crop for his services, a creditor of the owner of the plantation seized under a *fi. fa.* three-fourths of the growing crop, and became the purchaser thereof at the sheriff's sale. In an action by the overseer against the purchaser; *Held*, that the seizure did not operate as a partition between the overseer and his employer, nor restrict the right of the former to the fourth not seized; and that the purchaser, acquiring no greater right than his debtor had, is liable to the overseer for one-fourth of the price for which the three-fourths of the crop were sold. *Baudoin* v. *Nicolas*, 574.
6. The act of 22 March, 1843, ch. 66, which provides (sect. 5,) that the privilege granted to the city of Lafayette on property within its limits, for the proportion to which the owner is liable for any work done, or for taxes assessed thereon, shall only exist where an account thereof, duly certified, has been recorded in the office of the Recorder of Mortgages of the parish of Jefferson, does not apply to work done or taxes assessed before the date of that act; the right of the city to recover the cost of such work, or such taxes, must be governed by sects. 6 and 8 of the act 12 March, 1836. The act of 1836, gives a privilege only for work done, and not for taxes; no law previous to the act of 1843 gave any privilege for the latter.
Mechanics and Traders Bank v. *Richardson*, 596.

See SALE, 24, 25.

PUBLIC LANDS OF THE UNITED STATES.

1. A confirmation of a land claim by the government of the United States, amounts to no more than a relinquishment of all its rights to the land; it has no effect against third persons. *Broussard* v. *Gonsoulin*, 1.

2. Where parties claiming to be owners of a tract of land, prove an application by each to a Spanish Commandant for a grant of the premises, and a confirmation to each by the United States, but no complete title or grant to either from the Spanish government, and the first applicant is not shown to have ever been in possession, but the last is proved to have possessed and cultivated the premises for a number of years, the claim of the latter must prevail. *Ibid.*

QUASI-CONTRACTS.

1. Money placed in the hands of a cashier of a bank to be transmitted to a branch, having been lost through his negligence, to protect himself from suspicion he gave his notes for the amount, endorsed by a third person, the surety on the bond given by the cashier for the faithful discharge of his official duties. The notes having been paid by the endorser, in an action by the latter to recover the amount paid on the ground of error and illegality or want of consideration: *Held*, That the consideration for which the notes were given was not illegal; and that the obligation of the cashier to make good any loss occasioned by his neglect, if not a legal obligation, was, at least, a natural one, and sufficient to prevent the endorser from recovering back the amount paid by him. C. C. 2281, 2285.

Marigny v. *Union Bank of Louisiana*, 283.

2. Plaintiff having seized, under a *fi. fa.*, a sum in the hands of a third person, as the property of defendants, his debtors, the State intervened, alleging that the amount had been illegally paid to such third person by the treasurer: *Held*, That the payment being unauthorized, the amount should be returned into the treasury. *Jore* v. *Commercial Library Society*, 311.

RESCISSION, ACTION OF.

See SALE, V.

RECONVENTION.

See PLEADING, IV.

SALE.

I. *Requisites and Proof of Sale.*
II. *Obligations and Privilege of Vendor.*
III. *Obligations of Vendee.*
IV. *Rescission.*
V. *Judicial Sales.*

I. *Requisites and Proof of Sale.*

1. A debtor of plaintiffs proposed to sell to them his crop of cotton, the proceeds to be deducted from his debt. Plaintiffs were to give the current price for the cotton, and the sale was intended to be by weight. Plaintiffs' agent went

to the debtor's plantation, where he found in the gin and cotton-house a quantity of cotton in the seed, which the debtor told him, in the presence of witnesses, that he then delivered to him for his principals. The cotton was left on the place to be *ginned*, and pressed into bales. When a part had been put into bales, the agent marked them with plaintiff's initials, and had them hauled to the river for shipment, and while there they were seized under a *fi. fa.* at the suit of another creditor; and the remainder of the cotton on the plantation was seized at the same time, under the same writ. The cotton had not been weighed; the keys of the building in which the *unginned* cotton was, had not been delivered to plaintiff's agent; nor was it proved that it could not have been removed. In an action by plaintiffs against the seizing creditor and the sheriff: *Held*, that the sale was incomplete as to third persons, for the want of delivery. C. C. 2433, 2442, 2452, 2453. *Lambeth* v. *Wells*, 51.

2. A parol agreement to sell personal property, cannot protect it from seizure, where there has been no legal delivery. *Ibid.*

3. Where an act of sale of real property was signed by the parties in the presence of a parish judge, acting as a notary, no other proof of execution is necessary to authorize its being recorded, and to give it the effect against third persons which the law allows to acts *sous seing privé* duly registered. C. C. 2242, 2250. *Hood* v. *Segrest*, 210.

4. An act of sale, not authentic, owing to the want of the signature of one of the witnesses, or through any other defect of form, is good as a private writing, if signed by the parties. C. C. 2232. *Ibid.*

5. The letters of a party acknowledging that, in consideration of a certain sum, a third person had become jointly and equally interested with him in the purchase of real estate held in his name, and agreeing, for a fixed price, to convey to the same person one-half of his interest in a purchase of other lands, is evidence of a sale as between the parties, and the lands may be mortgaged by the purchaser, or subjected to legal mortgages as his property. *Per Curiam:* A sale, as between the parties, is complete as soon as there exists an agreement as to the object and the price, though the object be not delivered, nor the price paid, (C. C. 2413, 2431); the only formality required by law, as between the parties, is that the sale, when of immoveables, shall be in writing. C. C. 2415. *Barrett* v. *His Creditors*, 474.

6. A promise to sell amounts to a sale, where there exists a reciprocal consent of both parties as to the thing and the price thereof. C. C. 2437. *Ibid.*

7. Plaintiff's vendor sold him a lot of ground in the possession of a third person, for a certain sum payable whenever plaintiff should recover possession, and in consideration of his instituting and carrying on, at his expense, the necessary proceedings to recover the property. The vendor's title was founded on occupation by his ancestor, under a permission from a Spanish Governor. Plaintiff obtained a patent from the United States for the lot, but several years after, and before any action had been commenced by plaintiff against the party in possession, or the price had been paid, his vendor

sold the lot to defendants, who recovered possession, and paid the price stipulated in the act of sale to them. The first sale was made while the Code of 1808, and the Spanish laws were yet in force. In an action by the first purchaser against the defendants to recover the lot: *Held*, that the plaintiff not having complied with the terms of the first sale, his right to the lot was but inchoate at the time of the second; that the sale to defendants having been followed by the delivery of the thing and the payment of the price, must prevail; and that the only remedy of the plaintiff is by an action, *ex empto*, for damages against his vendor. *Lafon* v. *De Armas*, 598.

8. Though the right to demand the thing sold, on complying with the terms of the sale, is acquired by the purchaser, as to the seller, as soon as there exists an agreement between them as to the thing and the price, the sale is not complete as to third persons, until the price has been paid, unless a definite term has been granted for the payment, and the possession delivered. Code of 1808, book 3, tit. 6, arts. 1, 4, 24, 26, 36, 82, 86. *Ibid.*

II. *Obligations and Privilege of Vendor.*

9. Plaintiff sold defendant certain land, warranting it free from incumbrance, and taking notes from the latter, with a mortgage, for the price. Defendant resold it to a third person, also reserving a mortgage. The second purchaser failing to pay the price, defendant took out an order of seizure and sale, and the property was offered for sale, and a bid made for an amount exceeding that due from defendant to plaintiff, but no adjudication could take place, in consequence of plaintiff's failure to erase a mortgage in favor of a third person, which existed at the time of his sale to defendant. Plaintiff subsequently took out an order of seizure and sale on his mortgage, when, after several attempts to sell, the mortgage existing at the date of the first sale was erased by plaintiff, and the property sold for a sum much less than was offered at the sale under defendant's order of seizure. In an action by plaintiff to recover the balance due on defendant's notes, and plea in reconvention claiming damages for plaintiff's failure to erase the mortgage: *Held*, that the measure of the damages to which defendant is entitled, is the difference between the price for which the property actually sold, and that which might have been obtained had the mortgage been erased at the proper time. *Wilkins* v. *Bassett*, 28.

10. The vendor of a tract of land received from the purchaser his note for the price, endorsed by a third person. A mortgage was reserved by the notarial act of sale to secure the payment of the note, which was duly *paraphed* by the notary. The act was recorded in the mortgage office, and on the same day the vendor wrote on the face of the record, that "the mortgage is hereby released, without, however, acknowledging payment of the price of the purchase money." The release was gratuitous, and no third person had acquired any rights under it. In an action by plaintiffs, who had discounted the note, which was protested for non-payment, against the endorsers and the maker, claiming the vendor's privilege: *Held*, that there is a difference

between a special mortgage reserved to secure the price of the thing sold and the vendor's privilege: that the release of the mortgage did not extinguish the privilege, which resulted from the terms of the act; and that the parties cannot avail themselves of the release of the mortgage, to the prejudice of plaintiffs, who took the note on the faith of their signatures and endorsements, and with reference to an act which showed a sale on credit, and an express acknowledgment, accompanying the release, that the price had not been paid. *Citizens Bank* v. *Cuny*, 279.

III. *Obligations of Vendee.*

11. Where a purchaser promises in a written memorandum signed by him, to pay the price "by acceptance and note," the vendor must prove a demand of such acceptance and note, to entitle him to recover in an action on the memorandum for the price in money. *Offutt* v. *Morancy*, 92.

12. Though an heir who purchases property at a sale of the effects of the succession, is not obliged to pay the surplus of the price above the portion coming to him, until this portion is definitely fixed by a partition, (C. C. 1265, 2603); yet where interest from a certain time was stipulated as a part of the price of the property purchased, he will be bound to pay it, though from a period anterior to the partition of the property. *Per Curiam:* Were it otherwise, the condition of the heirs who purchase would be more favorable than that of the rest. *Marionneaux* v. *Marionneaux*, 666.

IV. *Rescission.*

13 Where a party sues to annul a conveyance of land which he alleges was fraudulently obtained, to his prejudice as a previous purchaser from the same vendors, to the knowledge of one of the defendants who acted as agent of the other, and prays to be declared the owner of the land, and for damages, the action will not be dismissed on an exception that it is brought in a parish which was neither the residence of the defendants, nor that in which the land was situated. *Per Curiam:* The action is rather a personal one, to obtain redress for a fraud, the effect of which was to deprive the plaintiff of a right previously acquired, than a real one to recover the land itself in the adverse possession of defendants; and though the annulling of the contract would confirm, as against the defendants, plaintiff's title to the land, the gist of the action is the cancelling of a contract. *Copley* v. *Berry*, 79.

14. Where a plaintiff recovers judgment in an action to annul a conveyance of land alleged to have been fraudulently obtained by the defendants, to his prejudice, from his vendors, defendants cannot complain that the judgment did not decide between such vendors, as their warrantors, and themselves. *Per Curiam:* If the conveyance was obtained by fraud, there was no valid assent, and no contract of sale, from which the obligations of warranty could result, ever existed; and the right of the defendants to recover back what was really paid under such a contract, may well be questioned. *Ex turpi causa non oritur actio. Ibid.*

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15. A declaration by the vendor in an act of sale *sous seing privé*, that the price had been paid, is not proof of payment against third persons.

Fisher v. *Moore*, 95.

16. Where an act of sale is attacked by a creditor of the vendor as simulated, on the ground that no price was paid, proof of payment of the price is on the party interested to maintain the sale. The creditor cannot be required to prove a negative. *Ibid.*

17. Though a creditor cannot treat a conveyance of real estate by his debtor alleged to be fraudulent, as null, and seize under a *fi. fa.* the property in the hands of his vendee; yet if the latter do not enjoin the proceedings, but permits the sheriff to seize and sell the property as still belonging to his vendor, and afterwards sues the purchaser at the sheriff's sale to annul the sale, and cause himself to be declared the owner of the property, the creditor, cited in warranty, may plead by way of exception, whatever he might have urged in a direct action to annul the first sale. *Ibid.*

18. A creditor having obtained a judgment against his debtor, caused certain property to be sold under execution, and became the purchaser. In an action by other creditors, against the debtor and purchaser, to annul the sale as fraudulent and intended to give an unjust preference to the latter, plaintiffs offered to prove declarations made by the debtor, out of the presence of the seizing creditor, tending to establish the fraudulent intention of the parties: *Held*, that the evidence, though insufficient to prove the alleged fraud as against the seizing creditor, was admissible.

Whiting v. *Prentice*, 141.

19. To annul a sale, at which the plaintiff in execution became the purchaser of the property sold, on the ground that the latter knew that the debtor was insolvent, and that the sale was made with intent to defraud other creditors, plaintiff must prove that the purchaser knew that the debtor was insolvent.

Ibid.

20. The acknowledgment by the vendor, in an authentic act of sale of real estate, that the price had been received by him, can be contradicted only by a counter letter, or by the acknowledgment of the purchaser, or his heirs, in answer to interrogatories on facts and articles.

Succession of Thomas, 215.

21. To annul a sale of community property made by a husband, it is not enough, under art. 2373 of the Civil Code, to show that it was simulated; it must be proved to have been fraudulently made, with a view to injure the wife. *Succession of Packwood*, 334.

22. Defendant, an illegitimate child, duly acknowledged, having been appointed by the testator, who died without other descendants, his universal heir and legatee, and put in possession of the property by the court before which the will was admitted to probate, sold certain land forming part thereof to a third person. In an action subsequently commenced by plaintiffs, who were sisters of the deceased, against the universal legatee and her vendee, claiming each one-half of the succession: *Held*, that the purchaser cannot have acquired by the sale any greater right than his vendor had to the property;

that plaintiffs having survived the testator, he could only dispose of one-fourth of his estate in favor of his natural child; and that the sale made by the latter must be annulled for three-fourths thereof, where the purchaser has not acquired title by the prescription of ten years, if a resident of the State, or twenty years if a non-resident. C. C. 3442, 3450, 3451. But where such property was purchased by a city corporation, for a fair price, to enable it to open a street for the public benefit, the sale will not be annulled, but the legitimate heirs will be left to their recourse against the universal legatee who received the price. C. C. 2604 to 2611.

Balot y Ripoll v. *Morina*, 553.

V. *Judicial Sales.*

23. Where property has been seized under a *fi. fa.*, before the return day, the sheriff may retain the writ, and sell the property after the time fixed for its return. *Labiche* v. *Lewis*, 8.

24. To prevent the sacrifice of debts seized under a *fi. fa.*, the parties to the execution agreed that the sheriff should suspend the sale and retain the writ after the return day, authorizing an agent to proceed to collect the debts. Other creditors of defendants in execution, subsequently to this agreement, levied a *fi. fa.* on the same debts in the hands of the sheriff, and it was agreed between them and the plaintiff in the original execution, that the debts should be sold under the first writ, "the proceeds of the sale to be held by the sheriff, subject to the orders of the proper court." In an action to determine which of the seizing creditors was entitled to the proceeds: *Held*, that no bad faith being imputed to the parties, they had a right to suspend the sale; that the debts never ceased to be under the control of the sheriff; that having permitted the sale to be made under the first execution, the creditors in the second execution cannot attack its legality; and that the creditor who first seized is entitled to a preference on the proceeds of the sale. C. P. 722. *Ibid.*

25. Notice to the debtors is not required where debts or credits have been seized under a *fi. fa.*; such notice is only necessary where a debt or credit has been transferred or assigned. The seizure of a debt does not transfer the property in it to the seizing creditor; it gives him only a right to be paid out of its proceeds when sold, until which time the defendant is not divested of his title. *Ibid.*

26. A sale under a *fi. fa.*, made before the promulgation of the statute of 6 April, 1843, ch. 135, in a parish in which a newspaper was published at the time, and not advertised therein as directed by art. 669 of the Code of Practice, will be annulled, unless in cases embraced by the statute of 28 February, 1828, ch. 29, where the amount of the judgment under which the seizure was made, is less than three hundred dollars.

Ex parte Groves, 130.

27. Where the price bid at a sale under a *fi. fa.*, does not exceed the amount of anterior special mortgages existing on the property, there can be no adjudication. C. P. 684. *Ibid.*

28. Where the owner of property seized under execution becomes its purchaser, at a credit of twelve months, he cannot be considered as acquiring any new right or title by the adjudication, which is not strictly a sale, but a means by which the creditor acquires additional security for his debt. Nor will the sureties on the bond be discharged by the omission of the creditor to require the execution of an act of sale to the debtor, with the reservation of a mortgage on the property to secure the price, though the sureties might, for their own protection, have insisted on such an act of sale being executed and recorded. *Aliter*, if, having received a mortgage, the creditor had subsequently released it; in such a case the sureties would be discharged. C. C. 3030. *Coons* v. *Graham*, 206.

29. Where the principal in a twelve-months bond is estopped by his execution of the bond from urging any informalities in the sale, as a defence to an action on the bond, his sureties, bound *in solido* with him, will be equally estopped from setting up any such defence. *Ibid.*

30. The purchaser of property sold under execution subject to special mortgages, is entitled to retain out of the price the amount required to pay such mortgages. C. P. 679, 683. But this privilege being allowed merely to protect him from the danger of paying twice, where the debts secured by mortgage have been extinguished by prescription or otherwise, the purchaser can no longer retain the amount. The extinction by prescription, after the purchase, of a debt evidenced by a note and secured by mortgage, and which formed a part of the price, enures to the benefit of the mortgagor, not of the purchaser. *Per Curiam:* The debt due by note is prescribed by five years from its date, while the obligation of the purchaser to pay the price is only prescribed by ten years. *Collier* v. *His Creditors*, 398.

See 12, 18, 19, *supra.*

SEQUESTRATION.

Defendant in a proceeding instituted in his own name, having caused certain slaves belonging to plaintiffs to be sequestered as the property of his debtor, an insolvent, subsequently qualified as syndic of the creditors of the latter, and in that capacity proceeded to advertise the slaves for sale. In an action by plaintiffs to arrest the sale, and for damages for the illegal sequestration: *Held*, that damages were properly allowed against the defendant individually. *Calmes* v. *Carruth.—Re-hearing*, 663.

SPANISH GOVERNMENT OF LOUISIANA.

According to the usages of the Spanish government of Louisiana, a double concession of land could be granted only in the rear of the front tract.
Broussard v. *Gonsoulin*, 1.

STATE, JURISDICTION OF.

The jurisdiction of a State, in civil cases, is co-extensive with its territory,

except where it has consented to part with a portion of it, under the constitution of the United States; and it extends over every portion of its soil severed from the public domain. *Dreux* v. *Kennedy*, 489.

STATUTES, CITED, EXPOUNDED, &c.

I. *Statutes of the State.*
II. *Statutes of Mississippi.*

I. *Statutes of the State.*

1805, July 3, § 5. Notarial acts. *Keller* v. *McCalop*, 639.
1808, March 31, § 6. Attorneys at law. *Turner* v. *Walsh*, 383.
1813, ——— 28, § 8. Fees of notaries. *Keller* v. *McCalop*, 639.
1814, December 21. Police of slaves. *State* v. *Thomas*, 48.
1815, February 6. Oaths of office. *Thompson* v. *Nicholson*, 326.
1817, ——— 20, § 9. Voluntary surrender—Sequestration of insolvent's property. *Calmes* v. *Carruth—Re-hearing*, 663.
1823, March 27, § 3. Attorneys at law. *Turner* v. *Walsh*, 383.
1826, ——— 22, § 1. ——————— *Ibid.*
1827, ——— 9. Authorizing inhabitants of Iberville to raise money by lottery. *Potts* v. *Camp*, 646.
——————— 13. Bills of exchange and promissory notes. *Grand Gulf Railroad and Banking Company* v. *Barnes*, 127. *Bell* v. *Lawson*, 152.
1828, February, 28. Advertisement of judicial sales. *Ex parte Groves*, 130.
——, March 7. Amending act authorizing inhabitants of Iberville to raise money by lottery. *Potts* v. *Camp*, 646.
——————— 25, §§ 1, 2. Tax on property bequeathed to or inherited by foreigners or non-residents. *Succession of Mager*, 584.
1831, March 25, § 3. Injunction. *Williams* v. *Planters Bank*, 125.
1833, ——— 1, § 1. Gas lights in New Orleans. *Gas Light and Banking Company* v. *Paulding*, 378.
1835, April 1, § 36. Incorporating New Orleans Gas Light and Banking Company. *Ibid.*
———————, §§ 10, 27. Incorporating Exchange and Banking Company of New Orleans. *Commissioners of Exchange and Banking Company* v. *Bein*, 578.
1836, March 12, §§ 6, 8. Amending charter of city of Lafayette. *Mechanics and Traders Bank* v. *Richardson*, 596.
1837, February 25. Prison bounds. *Guion* v. *Ford*, 123.
——, March 13. Settlement of successions. *Succession of Dubreuil.—Rehearing*, 511.
1838, ——— 7, § 5. Days of public rest. *Garland* v. *Holmes*, 421. *Keller* v. *McCalop*, 639.
1839, ——— 20, § 13. Interrogatories to third persons under a *fi. fa.* *Petway* v. *Goodin*, 445. *Poole* v. *Brooks*, 484.

1839, March 20, § 19. Appeal. *Oliver* v. *Williams*, 180.
———— § 24. Jury, in what cases not allowed. *Hennen* v. *Bourgeat*, 522.
1842, ——— 14, §§ 12, 23, 24. Liquidation of banks. *French* v. *Landis*, 639.
———— 26, § 4. Imposing tax on property bequeathed to or inherited by non-resident alien. *Succession of Mager*, 584.
————§ 9. Imposing tax on money and exchange brokers. *State* v. *Nathan*, 332.
1843, February 10. Interrogatories to a party. *Graves* v. *Hemken*, 103.
——, March 22. § 5. Amending charter of city of Lafayette. *Mechanics and Traders Bank* v. *Richardson*, 596.
———— 27. § 2. Judicial partitions. *Succession of Pigneguy*, 450.
————. § 3. ———— *Mayo* v. *Stroud*, 105.
——, April 6. Advertisement of judicial sales. *Ex parte Groves*, 130.

II. *Statutes of Mississippi.*

1822, June 25. Interest. *Coxe* v. *Rowley*, 273.
1840, February 21. § 7. Banks. *Williams* v. *Planters Bank*, 125. *Marshall* v. *Grand Gulf Railroad and Banking Company*, 198.
———— 22. Banks. *Williams* v. *Planters Bank*, 125.

SUCCESSIONS.

I. *Jurisdiction in Matters of Succession.*
II. *Presumption as to Property found in Possession of Deceased.*
III. *Vacant Successions.*
IV. *Of Executors, Administrators and Curators.*
V. *Claims against Successions.*
VI. *Sale of Property.*
VII. *Of Heirs and Legatees.*

I. *Jurisdiction in Matters of Succession.*

1. Courts of Probate are without jurisdiction of an action against a curatrix to render her personally liable for the debts of the succession, for mal-administration; or to determine whether real property, which she has not included in the inventory, but claims as her own, belongs to the succession, or not. *Per Curiam:* It is not enough to allege that a defendant is curatrix of an estate, to give jurisdiction to the probate court of a matter not in itself of probate jurisdiction. Even a suit on the bond of a curatrix against her and her sureties individually, must be brought before a court of ordinary jurisdiction, nor can a court of probate inquire directly into the title to real estate. *Hemken* v. *Ludewig*, 188.

2. A demand that an executrix be ordered to account and file a *tableau* of distribution, cannot be cumulated, in an action before a probate court, with a demand against the defendant to render her individually liable for mal-administration. The demands are contrary to each other, and cannot be prosecuted together; and a probate court is without jurisdiction as to the latter. *Ibid.*

3. The executor of the will of one who was domiciliated and died in another State, deriving his powers from a Probate Court of this State, administers only on the property of the deceased situated here; and that part of the estate of the deceased only, is under the control of the courts of this State. *Succession of Packwood*, 334.

4. A husband and wife, between whom a community of *acquests* existed in this State, having acquired a plantation which formed part of the community property, subsequently removed into a State where the common law prevails. After their removal, the husband and wife sold the plantation. After the death of the wife, the husband and the purchaser cancelled the sale; the notes given for the price were returned to the purchaser, and the plantation re-conveyed to the husband. The husband having qualified in this State as executor of his wife, on an opposition to an account filed by him, made by the heirs of the wife, claiming that the retrocession should enure to the benefit of the community, or that the husband should account to the heirs of the wife for one-half of the price: *Held*, that on the retrocession, the title vested in the husband alone; and that if the wife had any interest in the notes, the executor is not bound to account for it here, as both spouses lived in another State at the time, and the fund does not belong to the community. *Ibid.*

5. Where real estate belonging to a community existing between a husband and wife, is sold by the husband, and the spouses afterwards remove from this State, and the wife dies out of this State, the husband will not be accountable here for the price, if not existing here at the death of the wife. *Per Curiam:* The husband is no more accountable for that transaction than for the price of any other property sold by him before the dissolution of the community. *Ibid.*

II. *Presumption as to Property found in Possession of Deceased.*

6. Property of all kinds found in the possession of a person at the time of his death, is presumed to belong to his succession. *Lynch* v. *Benton*, 113.

III. *Vacant Successions.*

7. Under the Code of 1808 a succession was vacant, when no one claimed possession of it as heir, or under any other title. Book 3, tit. 1, art. 118. *Aliter* under the Civil Code of 1825. By this Code the heir becomes seized of the succession by the mere operation of law, from the moment it is opened by the death of the ancestor, before taking any steps to put himself

in possession, or expressing any willingness to accept, and even though ignorant that the succession was opened in his favor. C. C. 934 to 939.

Calvit v. *Mulhollan*, 258.

8. Prescription ran against a vacant estate under the Code of 1808. Book 3, tit. 20, art. 62. The law is the same under the Code of 1825. Art. 3492. *Ibid.*

9. Plaintiffs claimed, as heirs of their mother, one-half of a tract of land belonging to the community of *acquêts*, sold by the husband after the death of the wife. The sale was made while the Code of 1808 was in force. The husband after the wife's death became the natural tutor of the plaintiffs, then minors, and retained the community property in his possession, but took no steps to open the succession of the wife, and no one claimed possession of it either as heir or under any other title. Defendants pleaded the prescription of ten years. *Held*, that the succession being, according to the Code of 1808, a vacant one, prescription ran against the estate, and in favor of the defendants from the date of the sale till the promulgation of the new Code on the 20th June, 1825; that after its promulgation the succession ceased to be vacant, the heirs becoming from that moment seized of it; that no prescription could run against such of the heirs as were then minors; and that to ascertain whether the action of any heir was prescribed by the lapse of ten years, the time between the sale and the promulgation of the Code of 1825, should be added to that between the majority of the heir and the institution of the suit. C. C. 934 to 939, 3488, 3492. *Ibid.*

10. The State is entitled to a succession only in case of there being no lawful relation, husband or wife, or acknowledged natural child of the deceased, or of its not being claimed by any one entitled thereto. C. C. 477, 911, 923.

Succession of Mager, 584.

IV. *Of Executors, Administrators and Curators.*

11. Action against defendant personally for the amount of a promissory note, signed by him as executor, and endorsed by two other persons. It was proved that the note was given in part renewal of one made by defendant's testator, endorsed by the same persons, and which had been discounted for the deceased by plaintiffs; that the original note of the deceased was for a larger amount, which had been reduced in his lifetime by curtailments; and that, after his death, the debt was diminished by further curtailments, and the execution of new notes, signed by the defendant, as executor of the estate of deceased, or simply as executor, until reduced to the amount for which the note sued on was executed. *Held*, that the defendant is not liable personally; that the facts show that it was not originally contemplated by any of the parties that he should be so responsible; that the execution of the note sued on created no liability on the part of the estate of the deceased, nor even changed the nature of the original obligation, but was a mere acknowledgment of a debt which the executor was competent to make.

Bank of Louisiana v. *Déjean*, 16.

12. An administrator or executor cannot change the nature of the obligations of the succession, not increase its responsibility with regard to outstanding

debts, nor subject it to any new liabilities; if he attempt to do so, he will be personally bound. But he may acknowledge claims due by it, (C. P. 985,) pay or reduce its debts in due course of administration, or perform any other acts necessary for its liquidation. *Ibid.*

13. Tutors of minor heirs are not entitled, *ex officio*, to administer successions accruing to their wards. They may claim the administration, where there are no beneficiary heirs of age, in preference to any other person; but they must give security and qualify as other administrators. C. C. 1034, 1037. *Arthur* v. *Cochran*, 41.

14. An admission of the genuineness of the signatures to vouchers filed by the curator of a succession in support of his account, dispenses with any other proof of the payments claimed by him; but where such payments are made, without any order of court, the curator must show that the debts were really due by the succession, or he will not be entitled to credit for the amounts so paid. *Miller* v. *Miller*, 88.

15. Prescription does not run against the right which an administrator has to claim credit for debts of the succession paid by him. The relation of debtor and creditor does not properly exist between him and the estate, until after rendering his accounts, a balance has been struck for or against him. Whenever he may file his account, he will be entitled to credit for all sums legally paid for the estate, whatever may be the date of the payments. *Succession of Blakey*, 155.

16. The "bad debts" to be deducted from the amount of the inventory of a succession to ascertain the sum for which an administrator must give security, (C. C. 1041,) and the amount on which his commissions are to be calculated, (C. C. 1062,) are such debts as are prescribed, or due by bankrupts who have surrendered no property to be divided among their creditors. All other debts due to the estate must be taken into consideration in ascertaining the amount of the security, or the sum upon which the administrator is entitled to claim commissions; and as the administrator is bound to use due diligence to collect such debts, he is entitled to charge his commissions on their amount, whether he succeed in collecting them or not. *Ibid.*

17. A widow, who has accepted the community, is entitled to one-half of the balance found due after a full administration and the payment of all the debts of the estate; but she cannot by a petition to the Court of Probates, require the administrator of her husband's estate to account, and recover judgment for a specific sum against him, with interest from judicial demand, and cause herself to be placed on the *tableau* of distribution for such sum as if she were a creditor of the estate. An administrator owes but one account to the legal representatives of the deceased; and the judgment of the court, rendered contradictorily with the heirs and the widow, on a motion to homologate the account rendered by the administrator, should ascertain the balance due to the estate. Such balance bears interest at five per cent from the time of rendering the account, and the widow is entitled to one-half of it. *Succession of Thomas*, 215.

18. Rule on defendant to show cause why an execution should not be issued against her individually for a debt due by the succession of which she was

curatrix. Defendant failed to appear. The rule was made absolute, and she appealed. The citation to answer the rule was served on a person stated in the return to be the attorney in fact of the curatrix. There was no allegation in the rule that the defendant was absent from the State; and the power only authorized the attorney to represent her in her capacity of curatrix. *Held*, that the rule must be discharged, for, assuming that defendant was absent at the time of serving the citation, the power only authorized the attorney to represent her as curatrix, and the object of the rule was to render her personally liable. *Wilson* v. *Vincent*, 235.

19. Where, pending an action instituted by the natural tutor of certain minors to recover an amount due to them, the tutor dies, another tutor must be appointed, in whose name the proceedings may be carried on. The executor of the deceased tutor cannot represent the minors, nor receive, nor administer their property. In such a case, where the tutor dies pending an appeal, the action will be continued until the minors are properly represented, or come of age. *Mitchell* v. *Cooley*, 370.

20. In an action by an executor against the sureties of a former executor to recover money received by the latter belonging to the succession, defendants cannot plead in compensation a debt due by the deceased to their principal. The debt must be settled in the ordinary course of law, contradictorily with all the parties interested. *Fink* v. *Martin*, 416.

See 3, *supra*.

V. *Claims against Successions.*

21. Persons holding claims against a succession cannot sue the tutor of the minor heirs, and obtain a judgment against him for debts due by the deceased. Where no executor or administrator has qualified, they must provoke the appointment of an administrator, against whom, as the legal representative of the estate, they may institute suit. C. C. 1031 to 1060. C. P. 974 to 996. *Arthur* v. *Cochran*, 41.

22. Where an administrator has paid claims against a succession which were barred by prescription, or for which, for any other cause, the estate was not liable, the allowance of such payments must be opposed by a written opposition, in the court of the first instance. C. P. 1004. Credits claimed for payments not opposed below, cannot be objected to on appeal, though resisted on the ground that the debts so paid were prescribed. Art. 3427 of the Civil Code, which declares that prescription may be pleaded in every stage of the cause, even after appeal, does not apply to such a case.

Succession of Blakey, 155.

23. One not shown to be a creditor of a succession cannot oppose the allowance of claims set up by others. *Succession of Floyd*, 197.

24. The creditors of a succession have no right to intervene in proceedings by the heirs to compel an administrator to render his accounts. Such proceedings cannot prejudice their claims against the estate.

Succession of Thomas, 215.

25. The rights of creditors having privileges or mortgages are fixed at the time of the debtor's death. *Buard* v. *Lémée*, 243.

26. A partnership is dissolved by the death of one of the partners, unless there be a stipulation to the contrary (C. C. 2851); but where the succession of a partner in a particular partnership is insolvent, and administered with the benefit of inventory, the partnership cannot be continued without the assent of all the creditors, though the articles of partnership have provided for its continuance. *Ibid.*

27. Where plaintiffs claim, as heirs of their mother, one-half of certain community property sold by the husband after the death of the wife, and the vendee proves that the price of the property was applied to the payment of the debts of the community, he will be entitled to the reimbursement of the amount so paid for its benefit, in proportion to plaintiffs' interest in the community. *Calvit* v. *Mulhollan.—Re-hearing*, 266.

28. In a suit for freedom instituted against the curator of a succession and the tutrix of the heirs, judgment was rendered in favor of the plaintiff, and the tutrix alone appealed, without making the curator a party: *Held*, that the demand of the petition was indivisible, and the judgment a joint one; that it cannot stand as to the curator and be reversed as to the heirs; that no appeal having been taken by the curator within the time prescribed by law, the judgment had become final as to the succession; that the heirs, being minors, could accept the succession only with the benefit of inventory, and, as beneficiary heirs, were entitled only to the residue of the estate after the payment of the debts, (C. C. 1051;) that this residuary interest gave them no authority to represent the succession, and that their separate appeal could not prevent the judgment from becoming final against the estate; and that as the succession, in consequence of the judgment having become final, is concluded thereby, the appellants are also concluded. Appeal dismissed. *Andat* v. *Gilly*, 323.

29. In determining the compensation to be allowed to an attorney appointed to represent the absent heirs of a succession, the court should not be governed by the opinion of other members of the profession as to the amount. It should exercise its own judgment, and the allowance should be made with reference to the labor, skill, and care required, and to the value of the estate. *Succession of Mager*, 413.

30. The provision of art. 1176 of the Civil Code, which gives an action to the creditors of a succession, who present themselves for the first time after the distribution of the assets among the other creditors, to compel the latter to refund so much as may be necessary to give the rest the proportion they would have been entitled to receive, had they presented themselves at the time of the payment of the debts, can only avail those creditors whose claims have not been prescribed before the expiration of the three years within which such an action may be brought. *Succession of Dubreuil*, 507.

31. The acknowledgment of an administrator of a claim against a succession, unaccompanied by an order of the judge directing it to be ranked among the acknowledged debts of the succession, merely interrupts prescription, which will commence to run anew from that time; and where sufficient

time subsequently elapses before any further action on the part of the creditor, the claim will be prescribed. *Ibid.—Re-hearing*, 511.

See 17, *supra*; 45, 46, *infra*.

VI. *Sale of Property.*

32. Where one of the heirs mortgages his undivided share in certain immoveables belonging to the succession, and they are subsequently sold under an order of the Probate Court, for the purposes of liquidating and partitioning the succession, the proceeds of the sale of the share so mortgaged will stand in place of the property, and be subject in the hands of the administrator, to the claims of the mortgage creditor, as if no sale had been made. Act 27 March, 1843, s. 2. *Succession of Pigneguy*, 450.

33. A testator having directed that plaintiff, who was joint owner with him of a plantation, and who subsequently qualified as his testamentary executor, should have the privilege of taking his share of the plantation at a certain price, the latter as executor, presented a petition to the Probate Court praying that the attorney of the absent heirs might be cited, and the testator's half of the property adjudicated to him at the price fixed by the will. It was proved that the succession was insolvent. *Held:* that the estate being insolvent, a meeting of the creditors should have been called to deliberate on the most advantageous manner of selling its effects (C. C. 1160); that the creditors alone have a right to fix the time and conditions of the sale of the property; and that the proceedings, not having been carried on contradictorily with the creditors, nor with their consent, must be dismissed *Tucker* v. *Beatty*, 545.

34. Defendant, an illegitimate child, duly acknowledged, having been appointed by the testator, who died without other descendants, his universal heir and legatee, and put in possession of the property by the court before which the will was admitted to probate, sold certain land forming part thereof to a third person. In an action subsequently commenced by plaintiffs, who were sisters of the deceased, against the universal legatee and her vendee, claiming each one-half of the succession: *Held*, that the purchaser cannot have acquired by the sale any greater right than his vendor had to the property; that plaintiffs having survived the testator, he could only dispose of one-fourth of his estate in favor of his natural child; and that the sale made by the latter must be annulled for three-fourths thereof, where the purchaser has not acquired title by the prescription of ten years, if a resident of the State, or twenty years if a non-resident. C. C. 3442, 3450, 3451. But where such property was purchased by a city corporation, for a fair price, to enable it to open a street for the public benefit, the sale will not be annulled, but the legitimate heirs will be left to their recourse against the universal legatee who received the price. C. C. 2604 to 2611.

Balot y Ripoll v. *Morina*, 552.

35. Though an heir who purchases property at a sale of the effects of the succession, is not obliged to pay the surplus of the price above the portion coming to him, until this portion is definitely fixed by partition (C. C. 1265,

2603); yet where interest from a certain time was stipulated as a part of the price of the property purchased, he will be bound to pay it; though from a period anterior to the partition of the property. *Per Curiam:* Were it otherwise, the condition of the heirs who purchase would be more favorable than that of the rest. *Marionneaux* v. *Marionneaux*, 666.

VII. *Of Heirs and Legatees.*

36. A succession cannot be accepted for minor heirs, but with the benefit of inventory; and no portion of the estate can come into their possession, until it has been administered upon in due course of law, when, whatever may remain after the payment of the debts, will fall under the administration of their tutor. C. C. 1051. *Arthur* v. *Cochran*, 41.

37. Article 1474 of the Civil Code, which declares that where the father disposes in favor of his natural children, of the portion, which the law permits him so to dispose of, he shall dispose of the rest of his property, in favor of his legitimate relations, unless he bequeath it to some public institution, does not constitute his legitimate relations, his forced heirs for the rest of his estate; nor does it render void the disposition in favor of his natural children, though he make no disposition of the residue of his estate, or subsequently dispose of it, in favor of persons not his legitimate relations; such subsequent dispositions are absolutely null, and the remainder will go to his legal heirs. If he make any disposition of such remainder, it must be in favor of some public institution, or of his legitimate relations, but, where there are no forced heirs, he may bequeath it to such of them, one or more, as he may select. *Compton* v. *Prescott*, 56.

38. A testator, without children or descendants, after several particular legacies, one of which was a legacy, under an universal title, of one-fourth of his whole property to his natural children, bequeathed all the remainder of the estate, which he then owned or might afterwards acquire, both real and personal, to four nieces, to be equally divided between them. The particular legacies, except one of a sum of money to another niece, either failed from the incapacity of the legatees, or were reduced. *Held*, that by leaving the remainder of his estate to be divided between his four nieces, the testator intended to give them only what might remain, after the payment of the previous particular legacies; that they are not universal legatees (C. C. 1599,) but legatees under a universal title (C. C. 1604); that not being bound by the will to discharge any of the particular legacies, they cannot benefit by their failure or reduction (C. C. 1697); and that the legacies which have failed or the amounts by which they have been reduced, must be considered as portions of the estate remaining undisposed of, devolving under article 1702, upon the legal heirs. *Ibid.*

39. Art. 1478 of the Civil Code, which, after declaring that every disposition in favor of a person incapable of receiving shall be null, though made under the name of persons interposed, provides that the children of the incapable person shall be reputed persons interposed, does not contemplate the case where the children of such incapable person, are also the legitimate or duly

acknowledged natural children of the donor or testator; in such a case if there be any interposition, it must be proved. *Ibid.*

40. Illegitimate children of color, not the offspring of an incestuous or adulterous connection may prove their acknowledgment, by a white father, where such acknowledgment has been made by the latter, in a declaration before a notary public, in presence of two witnesses, not in the registry of the birth or baptism of such child; but no other proof of acknowledgment is admissible in favor of colored children, claiming descent from a white father. C. C. 221, 222, 226. *Ibid.*

41. Where the deceased has left no legitimate children or descendants, but a legitimate brother and sister, and descendants from other legitimate brothers, his natural children can receive from him, by donation *inter vivos*, or *mortis causa*, not more than one-fourth in value of his property. C. C. 1473. *Ibid.*

42. The undivided share of an heir in a succession may be seized and sold under execution (C. P. 647); but a creditor of an heir cannot seize and sell the right of his debtor to a part of the property inherited by him. The seizure must be of the whole of his rights in the succession, subject to the charges with which they may be burthened. *Mayo* v. *Stroud*, 105.

43. The renunciation, like the acceptance, of a succession, has effect from the opening of the succession. *Buard* v. *Lémée*, 242.

44. The removal of the husband and wife into another State, does not vest in either spouse any distinct or separate title to one undivided half of the community property previously acquired here. So long as the marriage continues, the husband retains his power over the property of the community; he has a right to enjoy its fruits; it is liable for his debts contracted after as well as before the change of domicil; and he may sell it, if the sale be not fraudulent. On the death of the wife, one-half of the property still in existence, acquired during the residence of the spouses here, will vest in the heirs of the wife, subject to the payment of the debts contracted by the husband during the marriage. *Succession of Packwood*, 334.

45. Real property inherited by one of the spouses during the marriage, and existing in kind at the time of its dissolution, should not be included in the settlement of the community between the survivor and the heirs of the deceased spouse; it must be withdrawn by the owner in the condition in which it existed at the dissolution of the marriage. If built upon, or improved during the marriage, the owner of the soil has a right to keep the improvements on accounting to the other spouse for one-half of the enhanced value of the property. C. C. 2377. He has no right to abandon the soil to the other spouse, nor to the community, and to claim in its place the amount of a previous valuation of it, thereby prejudicing the rights of others. *Mercier* v. *Canonge*, 385.

46. Where a slave, inherited by minors from the succession of their mother, has been illegally sold by their natural tutor, they will not be allowed to ratify the sale, and claim the price from their tutor to the prejudice of other creditors of the latter. Their recourse is against the purchaser for the recovery of the slave. *Ibid.*

47. An attorney appointed to represent the absent heirs of a succession, is incompetent to act as attorney in procuring the recognition of the heir. Such recognition must be sought contradictorily with him.

Succession of Mager, 413.

48. An appeal will lie in favor of the heirs from a judgment on an opposition made by them to a *tableau* of distribution presented by the curator of the succession of the deceased, though none of the claims so opposed and allowed against the estate exceed three hundred dollars, where their whole amount exceeds that sum.

State v. *Judge of Probates of New Orleans*, 415.

49. A testator leaving three or more children, or the descendants of three or more children, cannot dispose by donation *mortis causa* of more than one-third of his property. C. C. 1480. *Webb* v. *Goodby*, 539.

50. Grandchildren, forced heirs of the testator by representation of their mother, are bound to collate any legacy made to them by the testator, unless expressly made as an advantage over their co-heirs and besides their legitimate portion. C. C. 1306, 1307. *Ibid.*

51. Where a testator leaves no legitimate children nor descendants, but legitimate brothers or sisters, or descendants from them, an acknowledged natural child may receive from him, by donation *mortis causa*, one-fourth of his property. C. C. 1473. *Balot y Ripoll* v. *Morina*, 552.

52. Where by a donation *mortis causa* a testator disposes, in favor of an acknowledged natural child, of more than the law allows, the disposition is not null for the whole, but reducible to the *quantum* allowed by law. C. C. 1489. *Ibid.*

53. The 4th section of the act of 26th March, 1842, chap. 154, imposing a tax of ten per cent on all sums, or on the value of all property received by any non-resident alien, as heir, donee or legatee, from any succession opened in this State, or on so much thereof as may be situated in this State, is not inconsistent with sections 8, 10, of article 1 of the Constitution of the United States, nor with any treaty or act of Congress. *Succession of Mager*, 584.

See 10, 28, 32, 34, 35, *supra.*

SUMMARY PROCEEDINGS.

1. The act of December 21, 1814, imposing a penalty on any proprietor of a plantation, or agent of a proprietor, who shall neglect to keep on such plantation at least one white person for every thirty slaves working thereon, does not create an indictable offence. It contemplates not a criminal, but a civil proceeding, by motion of the district attorney, for the recovery of the fine. But where the district attorney proceeds by indictment, and, after a true bill found by the grand jury, and a conviction of the offender, makes a written motion, referring to the indictment and proceedings had thereon, making them a part of his motion, and prays for a judgment for the penalty, the motion for the recovery of the penalty will not be vitiated by the previous indictment and conviction; and, where the facts proved or admitted in the

record make out the case under the statute, the indictment, arraignment and trial will be disregarded as merely useless. *State* v. *Thomas*, 48.

2. Where accounts have been referred to auditors, the court may, on a motion to homologate the report, receive testimony and examine the auditors themselves, and correct any errors in the report, or order a new one, or a new examination of the accounts (C. P. 457); but it must proceed summarily. It cannot, without pronouncing on the report, submit the case to a jury. C. P. 457. *Flower* v. *Downs*, 101.

SURETY.

1. At the time of executing a prison-bounds bond by a debtor arrested under final process, the prison-limits were, under the statute of 25 February, 1837, coextensive with the boundary of the parish in which he resided. A new parish was afterwards formed from that portion of the old in which the debtor resided, and from part of a contiguous parish, and the seat of justice of the new parish established at a place never within the limits of the old. In an action against the surety on the bond, it was proved that the debtor had gone to the seat of justice of the new parish: *Held*, that the statute creating the new parish cannot have rendered the condition of the debtor more onerous by compelling him to remain within the restricted limits of the old parish; that, by the creation of the new parish, the debtor was either released altogether, or became a prisoner, in the custody of his bail, within the limits of the new parish; and consequently, that the bond was not forfeited. *Guion* v. *Ford*, 123.

2. Where other sureties have been substituted, the original surety in an injunction bond may be examined as a witness for the plaintiff in injunction, though, by the statute of 25 March, 1831, § 3, it is declared that the surety on the bond shall be considered as a party to the suit, and be liable to be condemned, *in solido*, with the plaintiff, for damages and interest.

Williams v. *Planters Bank*, 125.

3. An accommodation endorser of a note is not a surety in the meaning of art. 3518 of the Civil Code, which declares, that a citation served on the principal debtor, or his acknowledgment, interrupts prescription as to the surety. *Per Curiam:* The suretyship between an accommodation endorser and the maker of a note, exists only as between themselves; as to the holder, their liability depends on the rules applicable to negotiable instruments in general. *Jacobs* v. *Williams*, 183.

4. Plaintiff who had obtained an attachment on giving a bond as required by law, represented that the attachment had not been served or levied according to law, and was therefore void, and prayed that another attachment might be issued, which was done, but no new bond was executed. The bond referred only to the first attachment. *Held*, that the liability of the surety in the bond related exclusively to the first attachment and bound him only for any damage resulting from it; that the bond could not be revived without his consent; and that the second attachment must be dismissed.

Erwin v. *Commercial and Railroad Bank*, 227.

TAX.

1. The act of 26 March, 1842, section 9, imposing an annual tax of two hundred and fifty dollars on money and exchange brokers, is not inconsistent with the constitution of the State, nor of the United States.

State v. *Nathan*, 332.

2. A tax collector cannot be required to receive in payment of taxes, *coupons*, or warrants for the semi-annual interest due on certain bonds of the State, executed in favor of a bank, though the State be bound to pay the interest on the bonds, where the party taxed does not show himself to be the owner of the bonds, and the *coupons* or warrants purport to have been issued, and to be payable by the bank, and the laws authorizing the issuing of the bonds in favor of the bank, give it no power to issue such *coupons* or warrants in the name of the State. *Roman* v. *Ory*, 517.

3. The 4th section of the act of 26th March, 1842, chap. 154, imposing a tax of ten per cent on all sums, or on the value of all property received by any non-resident alien, as heir, donee or legatee, from any succession opened in this State, or on so much thereof as may be situated in this State, is not inconsistent with sections 8, 10, of article 1 of the Constitution of the United States, nor with any treaty or act of Congress. *Succession of Mager*, 584.

TRIAL, SETTING CASES FOR.

Where an attorney is appointed to represent absent defendants, and on the same day an answer is filed by him and the suit dismissed, the proceedings are irregular, and, on motion by plaintiff, the suit must be reinstated. *Per Curiam:* As soon as an answer has been filed, the clerk must place the case on the docket, that it may be called in its turn and a day fixed for its trial (C. P. 463); and the court can order a nonsuit without the consent of the plaintiff, only where the case has been set for trial, and the plaintiff fails to appear, personally or by attorney, on the day fixed. *Ibid.* 536.

Walton v. *Commercial and Railroad Bank*, 99.

TUTOR.

See MINOR.

WARRANTY.

See SALE, 9.

WILL.

See DONATIONS MORTIS CAUSA.

END OF THE TWELFTH AND LAST VOLUME.

ERRATA.

Page 130, line 13 from bottom for 25 substitute 28.
" 176 " 6 " top " *Follien* " *Follain.*
" 227 lines 14 and 18 " " defendants " defendant.
" " line 19 " " " appellants " appellant.
" 243 " 20 " " " 285 " 2851.
" 258 " 3 from bottom for 4492 " 3492.
" 312 " 2 from top " G. " J.
" 334 " 4 " bottom " 2273 " 2373.
" 423 " 17 " top " *creditor* " *debtor.*
" 520 lines 4 and 3 from bottom *dele* " *with whom it is alleged that the note was deposited as collateral security.*"
" 522 line 16 from bottom for 33 substitute 24.
" 530 " 13 " top " 3148 " 3184.
" 564 at top, in the numbering of the pages for 468 substitute 564.
" 621 line 12 from bottom for 366 substitute 346.